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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 655

BEACHVIEW BROADCASTING CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on September 18, 1858, and the order of the Court denying a petition for rehearing *en banc*, entered on October 22, 1958.

OPINIONS BELOW

The initial decision of the Hearing Examiner is unreported, and appears at pages 1a-73a of the appendix.* The decision of the Federal Communica-

* Pursuant to Rule 23(1)(c) of the Rules of this Court, for convenience the appendix to the petition is separately presented.

tions Commission is reported at 11 Pike & Fischer Radio Reg. 939 (1955), and appears at pages 73a-166a of the appendix. The memorandum opinion and order of the Commission released on October 8, 1956, is reported at 11 Pike & Fischer Radio Reg. 972-l (1956), and appears at pages 166a-171a of the appendix. The memorandum opinion and order of the Commission released on May 2, 1957, is reported at 22 F. C. C. Rep. 989, 11 Pike & Fischer Radio Reg. 972-o (1957), and appears at pages 171a-181a of the appendix.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported, and appears at pages 183a-186a of the appendix. The order of the Court of Appeals denying a petition for rehearing *en banc* appears at page 186a of the appendix.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on September 18, 1958. An order denying a petition for rehearing *en banc* was entered by the Court of Appeals on October 22, 1958.

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C., § 1254(1), and Section 402(j) of the Communications Act of 1934, Act of June 7, 1934, c. 426, 48 Stat. 926, as amended, 47 U. S. C., § 402(j).

QUESTIONS PRESENTED

1. Is the scope of judicial review of a regulatory agency's decision limited to a judicial determination that a "rational" basis has been stated for the agency's

action, so as to render the reviewing Court powerless to restrain the agency from shifting from case to case the character and emphasis of the comparative criteria it employs in selecting between competing applicants for an agency authorization, obliterating any predictable pattern of decision?

2. Where the Federal Communications Commission has established various comparative criteria as the public interest factors which it will apply in choosing between competing applicants for a broadcast facility, may the Commission without prior notice decide between applicants according to altered criteria, different in nature and specifications, without affording each of the parties an opportunity to present its case in the light of the criteria actually to be applied, and without justifying the changed criteria in terms of the statutory public interest standard?

3. If the Hearing Examiner and a minority of the members of the Commission who preferred one of the applicants for a new television broadcast station were "clearly right," can there exist a "rational basis" which will compel a reviewing Court nevertheless to affirm the decision of a majority of the Commissioners in favor of another applicant?

STATUTES INVOLVED

Section 309(a) and (b) of the Communications Act of 1934, Act of June 19, 1934, c. 652, 48 Stat. 1085, as amended, 47 U. S. C. § 309(a), (b):

> (a) If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a) of this section, it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a) of this section, it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. * * *

Section 10(e) of the Administrative Procedure Act, Act of June 11, 1946, c. 324, 60 Stat. 243; 5 U. S. C., § 1009(e):

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capri-

ous, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 or 8 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

STATEMENT OF THE CASE

Beachview Broadcasting Corporation (hereinafter sometimes called Beachview), petitioner herein, and Portsmouth Radio Corporation (hereinafter sometimes called Portsmouth) * each filed an application before the Federal Communications Commission for a construction permit for a new commercial television broadcast station to operate on Channel 10 in Norfolk-Newport News-Portsmouth, Virginia. Having found that the applications were mutually exclusive, and that a hearing was therefore mandatory under the provisions of Section 309(b) of the Communications Act of 1934,[1] the Commission designated the applica-

* During pendency of the appeal, Portsmouth Radio Corporation changed its name to Tidewater Teleradio, Inc.

[1] Act of June 19, 1934, c. 652, 48 Stat. 1085, as amended, 47 U.S.C., § 309(b).

tions for hearing in a consolidated proceeding in order to determine on a comparative basis which applicant would better serve the public interest, convenience and necessity.

Under the so-called "points of reliance" procedure then in effect, each applicant was required in advance of hearing to set forth in detail the points under established comparative criteria upon which it relied as showing significant differences between the parties which would merit the award of positive points of preference or negative points as demerits to the other party. After several pre-hearing conferences, during which the Examiner passed on the proposed points of reliance submitted by the parties, the points found acceptable were set forth in an "Order Governing Course of Proceeding," later amended, which served to delimit the issues of the hearing. (App., pp. 54a-73a.)

[2] Section 1.841, 18 Fed. Reg. 939 (Feb. 17, 1953), later rescinded, 19 Fed. Reg. 443, 445 (July 20, 1954).

[3] In the disposition over the years of comparative hearings where competing applicants seek radio or television broadcast facilities, the Commission has developed various aids, factors, or "criteria" which it recognizes must guide its determinations in adjudicatory proceedings from the public interest viewpoint. *WHDH, Inc.*, 22 F.C.C. Rep. 761, 858, par. 3, 13 Pike & Fischer Radio Reg. 507, 566, par. 3 (1957). Among the comparative criteria are included such factors as local residence, participation in the civic affairs of the community, the diversification of occupations and backgrounds of the principals, the integration of ownership and management in the day-to-day operation of the station, broadcast experience, past broadcast performance, planning and preparation, program policies and proposals, studios and equipment, other interests of the applicants affecting the concentration or diversification of the media of mass communications, and the like.

At the conclusion of the comparative hearing, the Hearing Examiner issued an initial decision in which he proposed that the application of Beachview for Channel 10 be granted and the application of Portsmouth for the same facility be denied. (App., pp. 1a-53a). No points of preference were awarded to Portsmouth. Beachview was awarded a positive comparative point of preference because of superior integration of ownership and management (App., pp. 52a-53a, pars. 107, 3, 4), and a negative point of preference because of the characteristics of a voting trust which had been established by Portsmouth (App., p. 53a, pars. 1, 4), the Examiners ruling that the "abandonment of their rights and duties by 50 Portsmouth stockholders to 11 voting trustees is contrary to the public interest." (App., p. 53a, pars. 2, 4).

Beachview showed that all eight of its stockholders would participate in the station's day-to-day operation (App., pp. 2a-10a, pars. 4-13), with its 77.77% stockholder to devote 90% of his time to the station's operation (App., pp. 3a-4a, par. 5), and three other stockholders, representing an additional 11.12% ownership interest, to be integrated on a full-time basis. (App., pp. 4a-5a, 8a-10a, pars. 6, 12, 13). Under the voting trust of Portsmouth, 50 of Portsmouth's 61 stockholders, owning 62.67% of Portsmouth's voting stock, surrendered all of their voting (management) rights to the remaining stockholders as trustees, who together owned only 37.33% of Portsmouth's stock in their own right. (App., pp. 20a-21a, 51a, pars. 32, 35, 105). Of the eleven Portsmouth trustees, only two trustees proposed to participate in full-time day-to-day operation (App., pp. 11a-13a, pars. 16, 17); the other nine trustees each proposing to spend 20 hours

or less per week at the station serving on advisory committees. (App., pp. 13a-18a, pars. 18-26). Although the 50 non-trustee stockholders were substantial owners of Portsmouth, only a half-dozen were to participate in management, and these only in slight to moderate degree. (App., p. 52a, par. 107).

The Hearing Examiner held that the 50 Portsmouth stockholders had thereby successfully placed a barricade between themselves and the corporation, defeating the "usual cause and effect relationship between ownership and management" and "deserting their rights and duties to a well-nigh irrevocable trust." (App., p. 51a, par. 105). He observed that a resolution of Portsmouth directors and stockholders in practical effect would "'clean the slate' for the voting trust agreement which with finality precludes any prospective participation in the affairs of the corporation" by non-trustee stockholders. (App., pp. 51a-52a, par. 106), and that the voting trust agreement made it possible for the eleven voting trustees to gain control of Portsmouth under circumstances which were in turn within the control of the trustees. (App., p. 53a, par. 108).

Exceptions to the initial decision were filed by both parties, and oral argument was held before the Commission *en banc*. On May 29, 1956, the Commission issued a decision in which it reversed the initial decision of the Hearing Examiner, granted the application of Portsmouth, and denied the mutually exclusive application of Beachview. (App., pp. 53a-165a). Of the seven members of the Commission, three voted for Portsmouth, two voted for Beachview, one did not participate, and one abstained from voting. (App., p. 73a). The Commission rejected the points of pref-

erence which the Hearing Examiner had awarded to Beachview, substituted a "minor preference" to Beachview for greater diversification of communications interests, but favored a grant to Portsmouth because of comparative differences in which it found Portsmouth prevailed in civic participation and past broadcast record. (App., p. 165a, par. 40).

In striking down Beachview's point of preference for integration of ownership and management, the Commission ruled: (1) that it must look not to the degree of participation in station management by the owners of the beneficial interest in the applicant, but to the activities of the eleven voting trustees owning 37.33% of the corporation's stock with the power going with stock ownership (App., pp. 146a-147a, par. 18); and (2) that the Examiner's conclusion had "failed to evaluate adequately the significance which should attach qualitatively" to the participation and television experience of Carl J. Burkland, Portsmouth's vice-president, director, trustee, and proposed station manager. (App., p. 149a, par. 19). Burkland had, however, only a 1.64% stock ownership interest, with an option to purchase an additional interest of one-third of 21.66%, of Portsmouth's voting stock. (App., p. 95a, par 28 and fn. 15).

The Commission likewise held that there was no evidence that the eleven voting trustees intended to obtain control of Portsmouth or that the fifty non-voting stockholders regarded the proposed station solely as a business investment to the exclusion of the public interest (App., pp. 151a-153a, pars. 23-25), although the Commission had found that the latter would not participate in decisions affecting Portsmouth's proposed operation, and would not exercise any degree of

stockholder control under the voting trust. (App., p. 106a, par. 42; p. 152a, par. 25). Noting that it had made an *ex parte* determination before hearing that the voting trust was in the public interest, the Commission ruled that the trust was not illegal *per se*. (App., pp. 151a-153a, par. 25 and fn. 29).

Beachview had asserted as a point of reliance that it was entitled to a point of preference because, unlike Portsmouth, it owned no radio facility or other medium of mass communication, and a grant to Portsmouth would place all five television channels in the area in the hands of licensees of radio stations. (App., pp. 158a-159a, par. 33). Taking note, like the Examiner (App., pp. 17a-18a, par. 99), of the number of broadcast facilities in the area, the Commission held that "a grant to Portsmouth would not tend toward concentration of control over mass media of any significant degree," but gave Beachview a preference "of minor weight" because there would be more diversification in the ownership of communications media in a grant to Beachview. (App., pp. 159a-160a, par. 34).

Portsmouth's ownership of a 5,000-watt, full-time regional radio station was also the basis for the Commission's award of a point of preference to Portsmouth for its past broadcast record, Beachview having no past record as a Commission licensee. (App., p. 141a, par. 11). The Examiner had refused to grant a preference on this point because of the short period of Portsmouth's operation of the radio station and the delay it encountered in making changes in the station's operation, and had concluded, "No basic historical facts of even slight consequence tending to support the point of reliance were established by exhibit

or testimony." (App., p. 47a, par. 98). The Commission, however, granted Portsmouth a preference on this point of reliance, although it stated that the preference was "not of great force in light of the brief period covered by such record (and recent acquisition thereof)", (App., p. 141a, par. 11), and "a minor one." (App., pp. 163a-164a, par. 38).

With respect to civic activities, the other area where Portsmouth was found by the Commission to merit a preference (App., p. 165a, par. 10), the Examiner had found that "the backgrounds of the principals of each applicant are so commendably broad and their civic connections so extended that the value of comparing them to determine superiority vanishes." (App., p. 48a, par. 100). Although the Commission found that five of Beachview's eight stockholders, representing an 88.89% ownership interest, had "each made substantial contributions to civic, charitable and other causes," and a sixth stockholder with a 10.03% interest had shown limited civic activity, (App., p. 76a, par. 7; p. 139a, par. 8), a controlling preference was granted to Portsmouth because the activities of its trustees showed the "assumption of responsibilities" in such causes "of the highest order". (App., p. 140a, par. 8). One of the trustees, Carl J. Burkland, a 1.61% stockholder whose "qualitative" experience had been a basic factor in the Commission's refusal to award points of preference to Beachview for integration of ownership and management (App., p. 149a, par. 19) and for broadcast experience (App., pp. 142a-143a, par. 13), had lived in the area for only five months prior to the commencement of the hearing, and showed negligible civic activities in the area of membership in two sales clubs and two Chambers of Commerce. (App., pp. 96a-97a, par. 30).

Case No. 13,583 in the United States Court of Appeals for the District of Columbia Circuit was an appeal timely filed by Beachview from the Commission's decision of May 31, 1956, (App., pp. 73a-165a) and a memorandum opinion and order of the Commission released on October 8, 1956, (App., pp. 166a-171a), denying a petition for reconsideration. Case No. 13,913 in the Court below was an appeal from a second memorandum opinion and order of the Commission, (App., pp. 171a-181a) denying Beachview's petition for further hearing, and related pleadings, alleging newly discovered evidence reflecting on Portsmouth's qualifications. Case No. 14,001 in the Court below was an appeal from the grant by the Commission by letter dated June 20, 1957, (App., pp. 182a-183a) of an application by Portsmouth for an extension of time to complete construction. The jurisdiction of the Court of Appeals was invoked pursuant to the provisions of Section 402(b) of the Communications Act of 1934,[3] and Section 10 of the Administrative Procedure Act.[4] The three appeals were consolidated for briefing and argument.

By opinion (App., pp. 183a-186a) and judgment (App., p. 186a) entered on September 18, 1958, a panel of the United States Court of Appeals for the District of Columbia Circuit affirmed the decision and orders of the Commission, holding *per curiam* that it could find nothing arbitrary, capricious, irrational or unreasonable in the Commission's discussion of the criteria applied. The Court stated:

[3] Act of June 7, 1934, c. 426, 48 Stat. 926, as amended, 47 U.S.C., § 402(b).

[4] Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C., § 1009.

> "The situation is clearly one in which the Congress has confided the function of decision in the Commission. The limited authority of the court in reviewing the matter does not touch any of the choices made by the Commission and alleged by appellant to have been erroneous. It may be that the Congress has confided too great power in the agency. But the power is in the Congress to dispense, and it is not within the judicial function to superimpose a court's judgment on regulatory measures such as those here involved."

Chief Judge Edgerton, concurring in the result, stated:

> "I think the hearing examiner and the minority of the Commission, who preferred Beachview, were clearly right, but I cannot say there was no rational basis for preferring Portsmouth."

A timely petition by Beachview for rehearing *en banc* was filed on October 3, 1958, and was denied by the Court, *per curiam*, by order entered on October 22, 1958. (App., p. 186a). Circuit Judge Miller stated he would grant the petition. Circuit Judge Bazelon stated:

> "I vote to grant the petition for rehearing in banc in order to reconsider this court's recent rulings which appear to render us powerless to restrain the Commission from employing shifting emphasis of comparative criteria obliterating any predictable pattern of decision."

REASONS FOR ALLOWANCE OF THE WRIT

The decision here sought to be reviewed would deny the validity of this Court's judgment that the "public interest, convenience, or necessity" provides a standard concrete and definite enough to guide and limit the determinations of a regulatory agency and to pro-

vide a firm basis for judicial review.[6] It would give substance to the recent pronouncement of the Harris Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce:[7] "The Communications Act, as amended, does not provide definitive criteria to guide the Commission in selecting the best qualified applicant among several competing for a particular channel or facility."

The statutory standard of the "public interest, convenience, or necessity" of the Communications Act of 1934[8] has been upheld by this Court as the touchstone provided by the Congress to govern the exercise of the licensing power of the Federal Communications Commission,[9] upon the premise that the criterion "is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power,"[10] but "is as concrete as the complicated factors for such a field of delegated authority permit."[11] "It is a mistaken assumption that this is a mere general reference to public welfare without any standards to guide determinations. The purpose of the Act, the requirements it

[6] *National Broadcasting Co. v. United States*, 319 U.S. 190, 215-216, 226 (1943).

[7] House Rep. No. 2711, 85th Cong., 2d Sess., p. 37 (1959).

[8] Act of June 19, 1934, c. 652, 48 Stat. 1064, as amended, 47 U.S.C., §§ 307 (a), (d), 309 (a), 310, 312.

[9] *National Broadcasting Co. v. United States*, note 6 *supra*, 319 U.S. at 215-216.

[10] *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933).

[11] *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

imposes, and the context of the provision in question shows the contrary."[12]

Thus, in choosing between two competing applicants for the same broadcast facilities, the Commission has not been "left at large" in performing its duty, but since the very inception of Federal regulation of radio has been governed by comparative considerations as to the services to be rendered in the public interest, to be determined after a full evidentiary hearing upon the mutually-exclusive applications in a consolidated proceeding.[13]

Although the Congress might have made the Commission's exercise of its licensing power not reviewable, it chose not to leave to the unbounded discretion of the regulatory body the final interpretation of the measure of its licensing authority and responsibility under the Communications Act of 1934, as amended. In the original scheme of regulation under Section 16 of the Radio Act of 1927, the Court of Appeals was authorized, in reviewing an action of the Federal Radio Commission, the predecessor of the Federal Communications Commission, to "alter or revise the decision appealed from and enter such judgment as to it may seem just."[14] Thereafter, since the power

[12] *New York Central Securities Corporation* v. *United States*, 287 U.S. 12, 24 (1932), quoted with approval in *National Broadcasting Co.* v. *United States*, note 6 *supra*, 319 U.S. at 226.

[13] *Id.*, 319 U.S. at 215-217.

[14] *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U.S. 327 (1945).

[15] *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 90 (1953).

[16] Section 16, Radio Act of 1927, c. 169, 44 Stat. 1169.

thus granted to the Court of Appeals was administrative rather than judicial, so as to preclude judicial review of the appellate decision by this Court.[17] Section 16 was amended[18] to limit review expressly to "questions of law" and to provide "that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary and capricious."[19]

Judicial review did not, however, divest the Court of Appeals of its responsibility to ascertain that administrative action comported with the statutory standard:[20]

> "* * * The powers of the commission were defined, and definition is limitation. Whether the commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action, are appropriate questions for judicial decision. These are the questions of law upon which the court is to pass. * * *"

With the formulation in 1934 of a unified and comprehensive regulatory system for the communications industry, the provisions for judicial review of Section 16 of the Radio Act of 1927 were absorbed into

[17] *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464, 467 (1930).

[18] Act of July 1, 1930, c. 788, 46 Stat. 844.

[19] *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, note 10, *supra*, 289 U.S. at 274-275.

[20] *Id.*, at 276.

Section 402(c) of the Communications Act of 1934.[21] Thereafter, the provisions for judicial review of Section 10(e) of the Administrative Procedure Act[22] were substituted through incorporation by reference when the procedural provisions of the Communications Act were revised by the McFarland Amendments of 1952.[23]

Again, it could not have been intended to restrict the Court of Appeals in the exercise of the full scope of judicial review. In *Federal Communications Commission* v. *RCA Communications, Inc.*,[24] this Court refused to accept a recitation by the Commission "in an abstract, sterile way" that a particular criterion may have beneficial effects, where the Commission has not "sufficiently laid bare its mind to enable us to perform our reviewing function," after having stated:

> "* * * Ours is not the duty of reviewing determinations of 'fact,' in the narrow, colloquial scope of that concept. Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the vagueish, penumbral bounds expressed by the standard of 'public interest.' It is our responsibility to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest."

Despite this Court's admonition, however, that "Reviewing courts must be influenced by a feeling that

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[21] Act of June 7, 1934, c. 426, 48 Stat. 926, as amended.

[22] Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C., § 1009 (e).

[23] Act of July 16, 1952, c. 879, Sec. 14, 66 Stat. 718, 47 U.S.C., § 402(g).

[24] Note 15 *supra*; 346 U.S. at 91, 94 and fn. 9.

they are not to abdicate the conventional judicial function,"[25] the judicial review of Commission decisions in comparative proceedings, which the Congress has assigned to the United States Court of Appeals for the District of Columbia Circuit,[26] has typically been characterized by the Court's refusal to assume judicial responsibility to require administrative adherence to the legislative limitations of power and an orderly pattern of decision. It has reached its apogee in the case here sought to be reviewed. The scope of judicial review is now an issue ripe for settlement by this Court, through a decision which crystallizes the degree of administrative license which a statutory court of review would afford a federal regulatory agency in terms bound to a standard of the public interest:

(1) The Court of Appeals has abandoned the requirement that the premises or bases for the Commission's decision be related to the *external* statutory standard of the public interest, and will ascertain only whether the Commission's decision is *internally* consistent, whether the final conclusion flows rationally from basic facts to ultimate facts, without regard to the measure of its responsiveness to the legislative mandate. In *Tampa Times Company* v. *Federal Communications Commission*,[27] the Court had stated: "So long as it [the Commission] observes all procedural requirements, considers the issues, reaches reasoned conclusions, and renders reasoned judgment, courts cannot superimpose their opinions upon these mat-

[25] *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490 (1951).

[26] Section 402(b)(1) of the Communications Act of 1934, Act of June 7, 1934, c. 426, 48 Stat. 926, as amended, 47 U.S.C., § 402(b)(1).

[27] 97 U.S. App. D.C. 256, 259, 230 F. 2d 224, 227 (1956).

ters." "It may be," the Court now declares, "that the Congress has confided too great power in the agency. But the power is in the Congress to dispense, and it is not within the judicial function to superimpose a court's judgment on regulatory measures such as those here involved." (App., p. 185a).

Only if the public interest standard is ignored, is it possible to reconcile the policy embodied in the criterion of ownership-management integration, that the parties who manage and control a station should be "those who have the keenest interest in the success of the enterprise and who are held responsible by the Commission for the operation of the station in the public interest,"[28] with the Commission's action in finding no significance in the abandonment of management rights by 50 stockholders, owning 62.67% of the applicant's voting stock, to 11 other stockholders holding a 37.33% stock interest, only two of whom would participate in full-time operation. Only by the substantial nullification of the established diversification principle, that the public interest is best served by the promotion of the decentralization of ownership of the media of public information, is it possible to permit the award of a mere token "minor" preference to Beachview, the only applicant to offer a new voice to the area unaffiliated with other media of mass communication. Only by stripping the diversification principle of any significance is it possible to award a balancing minor preference to Portsmouth for its brief operation of another communications medium.[29] Only

[28] *The Radio Station KHF Co.*, 11 Pike & Fischer Radio Reg. 1, 103-104 (1955).

[29] Compare *Tennessee Television, Inc.* v. *Federal Communications Commission*, ... U.S. App. D.C. ..., Nos. 13168, 13507, 13905, ... F. 2d ..., 17 Pike & Fischer Radio Reg. 2170 (Nov. 28, 1958).

by the severance of the criteria employed from any relation to the ultimate statutory standard, is it possible to support a decision which gives controlling weight to the civic participation "of the highest order" of Portsmouth's principals, despite the "substantial contributions" found for Beachview stockholders with an 88.89% ownership interest, against Beachview's superiority in integration and diversification.

In these critical areas of decision, which go to the heart of the question whether the Commission has complied with the legislative standard which fixes the limits of its discretion, the Court has said, not that they are matters which can be reconciled with the statutory standard of the public interest, but "The limited authority of the court in reviewing the matter does not touch any of the choices made by the Commission and alleged by appellant to have been erroneous." (App., p. 185a).

(2) The Court of Appeals has left the regulatory agency free to select between competing applicants for a permit without regard to any stability or predictability in the application, or even the nature, of the criteria employed from case to case. The criteria applied in comparative proceedings presumably represent the considered judgment of an informed and expert tribunal of the factors of comparison which will determine which applicant will better serve the public interest, convenience, and necessity. Distilled from long experience in the administration of the regulatory statute and in the disposition of individual comparative hearing cases, they tend to assume the character of rules of law. As expressions of the expertise of the regulatory agency, they represent in large measure the very justification for the existence of special-

ized bodies charged with the administration of a particular branch of federal regulatory law.

Since the legislative standard itself as expressed in the Communications Act of 1934, as amended, has remained fixed, then it might have been supposed that the individual criteria, evolved as principles of communications law interpreting the standard, would change in significance and nature only if (1) there has been a change in conditions which gave expression to the criteria, or (2) the criteria have been discovered to be erroneous. Instead, the Commission has been given a free hand to shift the emphasis of comparative criteria from case to case, obliterating any predictable pattern of decision, without the necessity for explanation or justification. In *McClatchy Broadcasting Co. v. Federal Communications Commission*,[30] the Commission was held entitled to consider an individual criterion "in connection with all other relevant facts and to attach such significance to it as its judgment dictates." In *Pinellas Broadcasting Company v. Federal Communications Commission*,[31] the Commission was held authorized to change its views as to the dominant importance or evil of particular criteria in relation to the public interest: "All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are not for the judiciary."

In practice, the Commission's evaluation of comparative criteria from case to case has not represented an evolution in the exercise of a considered judgment

[30] 99 U.S. App. D.C. 195, 198, 199, 239 F. 2d 15, 18, 19 (1956), cert. den. 353 U.S. 918 (1957).

[31] 97 U.S. App. D.C. 236, 238, 230 F. 2d 204, 206 (1956), cert. den. 350 U.S. 1007 (1956).

by the Commission, reflecting "the deposit of its experience, the disciplined feel of the expert,"[32] but chaos and confusion, without pattern, regularity, predictability, or discernable basic principles. In a study prepared for the Harris Special Subcommittee on Legislative Oversight entitled "FCC Standards or Comparative Criteria as Applied in 14 Representative Comparative TV Proceedings" (including the proceeding here sought to be reviewed), it was concluded: "In each case it would have been impossible to predict in advance the degree of weight which would be given to each of the foregoing criteria."[33]

Another writer has stated:[34]

> "'Since the advent of commercial television, there have been close to sixty cases involving comparative hearings of mutually-exclusive applications. These cases have not established a *modus operandi*. It is submitted that chaos now exists because of this apparent lack of consistent criteria which the members of the FCC have used in deciding these comparative cases.
>
> "A large segment of the legal profession in the District of Columbia devotes time to the preparation and presentation of comparative hearings before the FCC. * * * Yet it is believed that no matter how well versed and skilled they might be in this area of practice, none of them can even attempt to anticipate the outcome of a comparative hearing where the parties have already been ad-

[32] *Federal Communications Commission* v. *RCA Communications, Inc.*, note 15 *supra*, 346 U.S. at [illegible].

[33] House Rep. No. 2711, 85th Cong., 2d Sess., p. 38 (1959).

[34] Gottlieb, "The Criteria Employed by the Federal Communications Commission in Granting Mutually-Exclusive Applications for Television Facilities," 45 Georgetown Law Jour. 266, 267 (Winter, 1956-1957).

judged technically, legally, and financially qualified to operate the television station."

Inconsistency in the application of criteria has been particularly acute in the Commission's interpretation of diversification as a criterion.[35] One commentator has observed:[36]

"* * * In numerous cases the need for new, independent sources of dissemination has been subordinated to the criterion of 'greater broadcast experience.' The Commission has failed to show awareness that experience and diversification are often inversely related * * * *

"In other cases the Commission has been more aware of the public interest. On occasion it has completely reversed its policy of preferring the experienced applicant to the newcomer. The lack of experience of the unaffiliated candidate has been characterized as 'freshness of approach,' a qualification meriting preference over run-of-the-mill past experience. But the FCC's failure to develop a consistent affirmative policy has left the status of diversification unclear. And the Commission's repudiation of diversification in the cases

[35] Compare, e.g., *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 89 U.S. App. D.C. 13, 189 F. 2d 677 (1951), cert. den. 342 U.S. 830 (1951) and *McClatchy Broadcasting Co.* v. *Federal Communications Commission*, 99 U.S. App. D.C. 195, 199, 239 F. 2d 15, 19 (1956), cert. den. 353 U.S. 918 (1957), with *Pinellas Broadcasting Co.* v. *Federal Communications Commission*, 97 U.S. App. D.C. 236, 230 F. 2d 204 (1956), cert. den. 350 U.S. 1007 (1956) and *Tennessee Television, Inc.* v. *Federal Communications Commission*, — U.S. App. D.C. — (Nos. 13168, 13507, 13905, — F. 2d —, 17 Pike & Fischer Radio Reg. 2170 (Nov. 28, 1958).

[36] Comment, "Diversification and the Public Interest: Administrative Responsibility of the FCC," 66 Yale Law Jour. 365, 376-377, 379 (Jan., 1957).

> where that factor seemed most relevant has undermined the healthier precedents set in less extreme cases." [footnotes omitted]

The culmination of this process has been reached in the decision here sought to be reviewed, where the Commission has not only continued to shift the weight assigned to individual factors employed in reaching its decision, but has even altered the nature and characteristics of the criteria themselves, without prior notice or subsequent justification.

The integration of ownership and management as a criterion was completely subverted by considering the 11 voting trustees of Portsmouth as the applicant's 61 owners in applying the criterion, although the Commission had theretofore always properly looked to the participation in day-to-day operation of the persons *beneficially* interested in the applicant to insure licensee responsibility.[37] The Commission granted a crucial preference to Portsmouth for civic activities of its trustees "of the highest order," (App., p. 140a, par. 8), although Beachview's principal stockholders had also made "substantial contributions," (*Ibid.*), despite the established Commission policy against comparing civic activities inherently incapable of comparison.[38] In the area of diversification of the media of mass communications, the Commission granted only a minor

[37] *Aladdin Radio and Television Inc.*, 9 Pike & Fischer Radio Reg. 1, 38 (1953); *KTBS, Inc.*, 10 Pike & Fischer Radio Reg. 811, 871-872 (1955); *The Radio Station KHF Co.*, 11 Pike Fischer Radio Reg. 1, 103-104 (1955). "As a first condition, by the very definition of the term, the integration proposed must be by persons beneficially interested in the applicant, as owners thereof." *KFAB Broadcasting Co.*, 12 Pike & Fischer Radio Reg. 317, 391 (1956).

[38] *Tampa Times Co.*, 10 Pike & Fischer Radio Reg. 77, 196 (1955).

preference to Beachview because Portsmouth's regional radio broadcast station was only one of a number of other broadcast facilities in the area (App., pp. 159a-160a, par. 34), although the need for new, independent sources of public information, and not monopoly, has been the principle in considering this criterion.[39]

The prejudice to an applicant in shifting the meaning and weight of criteria in the final decision is clear and direct. Established criteria serve as the law of the case, the legal framework and points of relevant reference under which the case is tried. If the agency, after hearing, applies new or distorted criteria, under the guise of established criteria, to the facts of record, then in every practical and meaningful sense the party has been deprived of its right to a fair hearing and to cross-examination, the right to present evidence on its behalf and to probe and test the direct testimony offered by its opponent, within the ambit and periphery of the relevant facts and the applicable law. Certainly elementary fair play would require as a minimum that a case tried under one body of established criteria be remanded for further proceedings, if there is to be a change in the ground rules, the criteria which are to govern the decision.

The basic principle applicable was succinctly summarized in *National Labor Relations Board* v. *Mall Tool Co.*:[40] "Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily."

[39] *Id.*, at 138. Cf. *McClatchy Broadcasting Co.* v. *Federal Communications Commission*, note 35 *supra*.

[40] 119 F. 2d 700, 702 (7th Cir., 1941).

(3) The Court of Appeals has reduced the "substantial evidence" rule of Section 10(e) of the Administrative Procedure Act,[41] to a requirement that the Court must find that the agency has "touched base" on the points raised, and elicit some rational basis for decision, however plainly wrong the decision upon the whole record and clearly right the choice of the competing applicant.[42] By a disclaimer of authority, the Court has permitted to stand a Commission decision that the public interest would be better served by the grant of a broadcast facility to an applicant because (1) its principals showed civic activities "of the highest order" and (2) its operation of a radio station for a brief period was not offensive, a matter admittedly of minor significance, despite these factors favoring the other applicant: (1) 50 stockholders, having a 62.67% interest in the successful applicant, had surrendered management responsibility to 11 voting trustees, only two of whom would participate in full-time operation, while all of the other applicant's principals would participate in operation, four of them (with an 88.89% stock interest) full-time; (2) the unsuccessful applicant's principals had also made substantial contributions to civic causes; and (3) only the unsuccessful applicant offered a new, independent voice in broadcasting. When the basic determinations of decisional significance are thus stripped to their elements, an abiding and unalterable conclusion must remain that a fundamental mistake has been made.

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[41] Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C., § 1009 (e).

[42] Cf. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951).

CONCLUSION

The plain import of the decision here sought to be reviewed is that the Court of Appeals has now washed its hands of all responsibility in the administrative process to require an adherence to the Rule of Law in the conduct of adjudicatory proceedings, so long as the full trappings of formal ritual are preserved in the regulatory agency's decision: if the agency decision is internally consistent, then it need bear no relation to any coherent, cohesive, orderly body of agency law; if the findings and "reasoning" of the agency are stated therein, then it is not a matter of judicial cognizance that the result is patently erroneous.

With this ruling, the regulatory agency is now free without the tempering influence of judicial restraint to pick and choose among shifting criteria, however unresponsive to the agency's statutory directions and duties, or to the legal and lay concept that there should be an element of predictability in the law.[43] If the decision is to stand, then the last hope for establishing an orderly body of continuing principles which may be applied from case to case must sink into the morass that is currently communications law. Similarly foredoomed must be any hope for fundamental justice in the administrative process if an agency decision may stand without effective appellate review so long as it is not irrational, even though deemed clearly wrong.

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[43] Compare Cardozo, The Growth of the Law, 52 (Selected Writings, 207)

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

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U. S.

FILED

JAN 19 1959

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 655

BEACHVIEW BROADCASTING CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

APPENDIX

To Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPENDIX

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D. C.

In re Applications of

BEACHVIEW BROADCASTING CORPORATION Norfolk, Virginia	Docket No. 10800 File No. BPCT-1605
PORTSMOUTH RADIO CORPORATION Portsmouth, Virginia	Docket No. 10801 File No. BPCT-1750

For Construction Permits for New Television Stations (Channel 10)

Appearances

Edward P. Morgan, Esq., (Welch, Mott, and Morgan), for Beachview Broadcasting Corporation; *Harry M. Plotkin*, Esq., *Reed Miller*, Esq., and *George Bunn*, Esq., (Arnold, Fortas, and Porter), for Portsmouth Radio Corporation; *Earl C. Walck* and *Stanley B. Cohen* for the Broadcast Bureau of the Federal Communications Commission.

INITIAL DECISION

I

PRELIMINARY STATEMENT

1. This proceeding is a result of the Commission having consolidated for hearing the mutually exclusive applications of Beachview Broadcasting Corporation, Norfolk, Virginia (Beachview) and Portsmouth Radio Corporation, Portsmouth, Virginia (Portsmouth) for construction permits for new television stations on channel 10 in the Norfolk, Virginia area. The findings and conclusions are subject to the so-called "points of reliance" system.[1]

2. The Commission has found each of the applicants to be legally, technically, and financially qualified. Involved

[1] Hearing orders of Feb. 4, 1954 (54M-176, 1594), Feb. 5, 1954 (54M-186, 1614), and March 24, 1954 (54M-406, 4095) containing the points of reliance are attached hereto.

herein is the standard, three-part comparative issue common to proceedings of this nature:

> "To determine on a comparative basis which of the operations proposed in the above-entitled applications would best serve the public interest, convenience or necessity in the light of the record made with respect to the significant differences as to:
>
> (a) The background and experience of each of the above-named applicants having a bearing on its ability to own and operate the proposed television station.
>
> (b) The proposals of each of the above-named applicants with respect to the management and operation of the proposed station.
>
> (c) The programming service proposed in each of the above-entitled applications.

II

Findings of Fact—Composition of the Applicants

Beachview

3. Beachview is a Virginia corporation organized in 1948 by Dudley Cooper and Irvin M. Kipnes who filed an application for a television construction permit in that year. That application was subsequently caught in the so-called television "freeze." Cooper and Kipnes were the only stockholders until September, 1953, when six other stockholders were admitted.

4. Beachview's present officers, directors, and stockholders, together with the number of shares and percent (by shares) of stock held and or subscribed, are as follows:

Name.	Position Held	Stock Interest (No. of Shares) Now Held	Subscribed	Percent of Stock (By No. of Shares)
Dudley Cooper,	President Director	74	500	77.77%
Irvin M. Kipnes,	Secretary Director	74		40.03
Vernon T. Myers,	V. P. Director	—	20	2.71
Paul O. Hirschbiel,	Treasurer Director		10	1.36
W. Gerald Akers,	V. P. Director	2	—	.27
John R. Roughton,	V. P. Director	—	50	6.77
Francis V. Guidice,	Director		5	.67
Cath Anne Flaherty,	Director		3	.42

5. *Dudley Cooper.* President. Cooper, born in North Carolina in 1899, has resided in Norfolk approximately 53 years. He received his secondary education in Norfolk, then studied optometry in New York. Since 1920 he has practiced optometry in the Norfolk area and, for a number of years, has also engaged in the jewelry business. In 1943, Cooper and his family purchased the run-down Ocean View Amusement Park in Norfolk, subsequently rehabilitating it physically with the result that the Park became a major attraction during the war years for service personnel, war workers, and other Norfolk area people. In 1944, Cooper acquired Ocean Park Beach on Chesapeake Bay, some of whose facilities he converted for use, rent-free, by the USO and servicemen generally, including convalescents. He sold Ocean Park Beach after the war. In 1944 he also acquired Seaside Park at Virginia Beach, subsequently improving and adding to its facilities, which were in disrepair. The Princess Anne County Fair (whose proceeds are dedicated to community welfare) is held at Seaside Park, and Cooper extends certain services to this enterprise free of charge. On a sublease basis, he has also participated in the operation of Seaview Beach Park, a Negro amusement park, apparently similar to the white amusement park in which he is interested. Cooper, often at considerable personal expenditure of time and money, has engaged in a wide variety of enterprises which he has deemed to be for the betterment of his community. These need not be detailed here, nor is it necessary to recount, per item, the list of his religious, cultural, fraternal, charitable, and business affiliations of the types commonly put in evidence in proceedings of this kind. It suffices to say he is a member of (among others) such organizations or institutions as Ohef Sholom Temple, B'nai Brith, National Council of Christians and Jews, YMCA, American Legion, and the Chambers of Commerce in the area. In some of these he has held official positions; in addition, he has been active in Norfolk art and music circles. With the idea of

preparing himself for the management of a television station, Cooper has visited several television stations and has attended and graduated from a course of study, RCA's Television Technical Program, conducted in Camden, New Jersey. He will devote 90 percent of his time to the station as its General Manager.

6. *Irvin M. Kipnes*, Secretary-Director. Born in Hudson, New York in 1925, Kipnes now resides in Virginia Beach, Virginia. He attended public schools in Hudson and did some reporting there for a daily newspaper while he was in high school and for a short time thereafter. Then he came to Washington, D. C. where he reported for the Washington Times-Herald and attended night classes at George Washington University. For about a year (1946-47) he reported for "Broadcasting-Telecasting" magazine, covering the FCC. In February, 1947, Kipnes left the magazine to become Secretary and General Manager of Cavalier Broadcasting Corporation, at that time an applicant which later commenced operation in Norfolk in December, 1947. He left Cavalier in April, 1948 and subsequently sold to it his 5 shares of stock therein. He next assisted in the organization of Beachview which, in August, 1948, filed applications for radio and television stations in Norfolk. In 1948-49 he had periods of employment with radio station WSID, Baltimore (as Commercial Manager) and radio station WDEM, Providence (as General Manager). In 1950 Kipnes organized and became president and a 50 percent stockholder of a real estate firm in Arlington, Virginia—a financially unsuccessful venture which was dissolved in 1952 when he became an account executive with a Washington advertising firm. As such, he materially participated in the production (by the stations) of television shows in the television markets of Virginia. He resigned this position in July, 1953, returning to Norfolk and Beachview. Kipnes is a member of the National Press Club, Washington; the Radio Correspondents Association; Norfolk Chamber of Commerce; and B'nai Brith of

Norfolk. He was formerly a member of the Advertising Federation of America, the Providence, R. I. Chamber of Commerce, and the Providence Red Cross and March of Dimes Radio Council. He will devote full time to Beachview as its Commercial and Assistant General Manager.

7. *Vernon T. Myers.* Vice-President, Director. Myers has resided in Norfolk, Virginia, all of his life. He has been continuously in the contracting business since 1920 and has constructed some of the largest housing developments in the Hampton Roads area. Primarily, however, he has been a development contractor, specializing in commercial work. Myers is Secretary of the Virginia Cruise Corporation which is concerned with cruises of buisnessmen to South America, which are co-sponsored by the Virginia State Chamber of Commerce and the Norfolk Port Authority. He has been interested in scout work for thirty-one years, receiving scouting's highest award, the Silver Beaver, in 1937. He is semi-retired from his contracting business and plans to withdraw from it almost completely by 197[illegible]. He is associated with the following organizations in the Norfolk area: Lions Club of Norfolk, American Legion and 29th Division Association, Isaak Walton League, Masonic Order, Travel Protective Association, Norfolk Sports Club, Norfolk Yacht and Country Club, Norfolk Chamber of Commerce, Virginia State Chamber of Commerce, U. S. Power Squadron, and Twenty-first Street Business Area Association. He has had no broadcasting experience. He will devote 24 hours per week to the station in the supervision of certain local programs and the acquisition of talent for live shows.

8. *Paul O. Hirschbiel.* Treasurer-Director. Hirschbiel is a life-long resident of the Norfolk area. He is a graduate of Rutgers University Graduate School of Banking. Beginning as a runner for the Seaboard Citizens National Bank in 1928, through successive promotions he has become Vice-President of the Seaboard Citizens National Bank, Norfolk. Mr. Hirschbiel has actively participated, at times in an

official capacity in the work of the following organizations in the Norfolk community: USO, Travelers Aid Society, Turney Home for Boys, Norfolk Council of Social Agencies, Civilian Defense, Community Chest, Virginia Bankers Association, Norfolk Chamber of Commerce, Optomist Club of Norfolk, March of Dimes, Red Cross, Mental Hygiene Society, Cancer Society, Talbot Park Civic League, Citizens Committee for Traffic Safety, Norfolk Sports Club, Downtown Business Men's Club, and the Norfolk Yacht and Country Club.

9. The record shows that Hirschbiel intends to devote twenty-four hours weekly to the day-to-day operation of the station on a planned schedule,[2] concentrating his efforts on the so-called public service phases of programming and financial matters. Counsel for Portsmouth called Mr. Roy Dudley, Executive Vice-President of the Seaboard Citizens National Bank, in an effort to determine whether Hirschbiel could engage in the affairs of Beachview as indicated. Dudley's testimony cast serious doubt as to whether Hirschbiel could adhere to the rigid time-table set up for him but did establish that officials of the Bank do not have hard and fast hours, that they do what they can to help clients (such as are associated with Beachview), and that Hirschbiel has occasion on behalf of the bank "to engage in contacts with folks in the community on civic matters and things of that sort." (Tr. 1799-1803 inc.) Dudley's testimony leads to the finding that Hirschbiel could not keep (regularly, at least) the exact schedule Beachview has set up for him, but that he could devote time to the affairs of the applicant and do so with the full consent of the bank provided it did not punish the affairs of the bank. There is no indication in the record that his devoting an aggregate of twenty-four hours a week to Beachview would punish the affairs of the bank and it is therefore found that he could so devote twenty-four hours per week.

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[2] 2:00 P.M.-6:00 P.M. M. T. Th., 2:00 P.M.-8:00 P.M. W.; 2:00 P.M.-4:00 P.M. F.; 9:00 A.M.-1:00 P.M. Sat.

10. *Dr. William Gerald Akers.* Vice-President, Director. Akers has resided in the Norfolk area for twenty-three years. He holds an M.A. degree from the University of Kentucky, and a Ph.D degree, magna cum laude, from the University of Heidelberg. He has attended several European Universities. In September, 1931, he was appointed Assistant Professor of Modern Languages at the College of William and Mary, Norfolk Division. In 1945, he was made head of the Division of Languages, Music, and Fine Arts at the college, a position he now holds. He is senior member of the faculty and is Chairman of the Director's Faculty Advisory Committee. Akers' civic, professional, cultural and related associations include: Norfolk Chapter of the American Association of University Professors (President for three terms); Virginia Chapter, American Association of Teachers of Spanish (President for two terms); American Association of Teachers of German; Norfolk Chapter of the Round Table International; Norfolk Central YMCA's Junior Advisory Council; Norfolk City Manager's Crime Conference; Norfolk Little Theatre; Director, William and Mary Concert Series; Feldman Chamber Music Society; Norfolk Film Society; Virginia Society of Ornithology. He has actively engaged in slum clearance work. Since 1937, he has appeared on various radio and television broadcasts. He has served as Chairman of the Committee on Television of the College of William and Mary. In this capacity he was responsible for providing weekly programs of a varied nature over Station WTAR-TV, Norfolk. Following a planned schedule he will devote a minimum of ten hours weekly to the day-to-day operation of the station on a planned schedule, concentrating on directing the station's educational programming.

11. *John R. Roughton.* Vice-President, Director. Roughton has resided in Norfolk for the past twenty-five years. He has been an automobile dealer for many years, and is now President, General Manager, and a 66⅔-percent stockholder of Roughton Pontiac Corporation. He has sub-

stantial real estate holdings. Over a period of time he has delegated operating authority in his business to such a point that he devotes a very substantial portion of his time to civic activities and institutions including: Leigh Memorial Hospital (member, Board of Directors); Norfolk Chamber of Commerce (member, Board of Directors); Norfolk Kiwanis Club (member, Board of Directors); Norfolk Community Chest; Virginia State Chamber of Commerce; Talbot Park Civic League of Norfolk (President); and the Norfolk Executives Club. Roughton is a Mason, a member of the Norfolk Country Club, and past president of the Norfolk-Portsmouth Automobile Dealers Association. His civic activities are matched by his religious activities. He will devote twenty-four hours weekly, on a planned schedule, toward religious and health programming. This will include the securing of ministers, physicians, civic leaders and the like for program appearances. He has had no broadcasting experience.

12. *Francis V. Guidice*: Director. Born in Maryland in 1917, Guidice is a resident of the Washington, D. C. area who plans to move to Norfolk to devote full time to Beachview as Production Manager. After a hitch in the Army, he was successively employed by the Veterans Administration and Military Intelligence. Subsequently he enlisted in the U. S. Maritime Service where he was trained as a communications officer. In 1945, Guidice was employed as an engineer by Radio Station WITH in Baltimore. Later, he handled the planning and installation of Radio Station WLEE, Richmond, Virginia. He resigned from his position with WLEE in 1947 to accept a Civil Service position as an engineer with the Armed Forces Radio Service. He remained in this position for several months, resigning to join the DuMont Television Network's new Washington, D. C., outlet WTTG, as an engineer. Shortly thereafter he was transferred to the production department as a director and, at the time of his testimony, was Senior Producer-Director and Assistant Operations Manager of WTTG. Among the network shows he is producing or has produced

are: "Meet Your Congress," "The Big Issue," "Washington Exclusive," and "Leave It To The Girls." The last is a network show orginating from ABC in New York City. In addition to these programs, Guidice also produces and directs 20 local television shows weekly on WTTG, including "Capitol Caravan," a one-hour variety show featuring all-negro Talent; "Housewives Bazaar"; "TV Disk Jockey"; "The Max Resnick Show" an all-Jewish variety program, and news and sports programs. He has produced all of the remote programs orginating for the DuMont network in Washington, including Presidential speeches from the White House and Congressional hearings. Other programs which he has produced for the DuMont network include such shows as: "Georgetown Forum," which under his direction won a Peabody Award for program excellence; "Pentagon Washington," a public service program for the Department of Defense; "Tris Coffin's Washington Report"; and the 1948 and 1952 Presidential Inaugural parades and balls. He also produced "Keep Posted," sponsored by the Curtis Publishing Company; "The Washington Senator's Baseball Games" and a "Muscular Dystrophy Telethon." The record does not reveal his participation in any civic activities.

13. *Ruth Anne Flaherty.* Director. Mrs. Flaherty, born in Minnesota in 1924, now resides in Cedar Rapids, Iowa where she is employed by television station WMT-TV. She intends to move to Norfolk to devote full time to Beachview as its director of woman's and children's activities. A graduate of the College of St. Catherine, St. Paul, Minnesota, with an A.B. degree in speech; Mrs. Flaherty from 1945 to 1949 was variously employed as a stewardess with Northwest Airlines, Field Director of the Spokane (Washington) Council of the Girl Scouts, Co-Director of the Guniga Din Youth Center, and a teacher in the Hawthorne Elementary School, Hawthorne, California, and in the Spokane City School system. In September, 1949, she became Field Director of the Montgomery Council of Camp Fire

Girls, Potomac area Council, Washington, D. C., a position which she held until June, 1951. She has taught in the Pre-School Department of the University of Maryland. Mrs. Flaherty has had experience as a television actress and has written and produced television programs. For three years she has produced her own television Children's show, known as "Miss Ruth Anne's Kindergarten," first over WTOP-TV and WMAL-TV in Washington, D. C., and presently over WMT-TV in Cedar Rapids. She wrote, narrated, and produced a fashion show for WMAL-TV; and, in conjunction with her husband, William Flaherty, produced a "how-to-do-it" type of program for WMAL-TV. As an actress, Mrs. Flaherty has appeared on four NBC network religious productions of "Frontiers of Faith." She has participated in panel shows and in several kineseopes for the ABC television network. In recent years she has volunteered much of her time to training Camp Fire leaders and in making talks on child psychology and parent-child relationships to mother's groups and Parent Teachers Association. In addition to her work with the Camp Fire Girls, she has been active in the Sodality, the Council of Lay Hospital Donors, and as a Community Chest volunteer. She has never been a resident of Norfolk and has no civic ties there.

14. *William Flaherty.* Senior Producer-Director.[3] Flaherty has served in a production capacity for WMAL-TV and as production manager at KCRI-TV, Cedar Rapids, Iowa. He will devote full time as a Senior Producer-Director of Beachview.

15. *Ben Wahrman.* Director of Public Affairs. Wahrman, Director of the Convention and Publicity Bureau of the Norfolk Chamber of Commerce will serve as Beachview's Director of Public Affairs. He has lived in Norfolk most of his life and has a wide background there in the

[3] William Flaherty and Ben Wahrman are not officers, stockholders, or directors, but, are shown herein because of their definite designations to important staff positions.

field of public relations, including experience as a Norfolk newspaperman and Chamber of Commerce executive. He has had some experience in television. In his capacity with the Chamber of Commerce, he administers the advertising fund appropriated by the Norfolk City Council; is responsible for Norfolk's annual International Azalea Festival, and is liaison man for the City and the U. S. Navy. Wathriman's work is entirely with civic groups and organizations; he acts as Secretary of the following Chamber committees: Armed Forces, Civic Affairs, Resort, Azalea Festival, Jamestown Exposition, Special Events and Projects, and Conventions, Publications and Advertising. In addition, he has been an active participant in the organization of many Norfolk and State charity, athletic, and promotional events. It is not clear how much time he will devote to Beachview.

Portsmouth

16. *Hunter C. Phelan.* President, Director, Stock Subscriber, Proposed Trustee. Phelan was born in Fort Worth, Texas, in 1893. His residence since 1939 has been Bay Colony, Virginia. The food business occupied the major portion of his time for many years. Formerly president of Colonial Stores, Inc. (a food chain) he is still a director of that company but may fairly be said to be practically retired from the food industry. He has been a director and stockholder in National Food Products Corp. (a Boston, Mass. holding company), National Bank of Commerce, Norfolk, and the Richmond Ice Co., Richmond, Virginia, to name but a few. He has organized and been an official of trade associations and from the NRA days through the war he actively participated in various phases of Federal regulation of the food and related industries. The range of his business, civic, charitable, and kindred activities is broad and convincing of interested participation in matters that are deemed to be productive of community betterment. As in the case of Dudley Cooper, it is not necessary to item-

ize his many affiliations and accomplishments. He has been active in Norfolk Community Chest affairs for many years; has been on the Men's Advisory Committee of King's Daughters; Board of Management, Navy YMCA; is a Member of Board of Boys Club; and was at one time Chairman of Organization Committee, Norfolk Foundation. He has been an officer or director of the following: Norfolk Passenger Transportation Commission; Advisory Committee, Norfolk Port Authority; Norfolk Industrial Commission; Norfolk-Hampton Roads Area, Navy Reemployment Committee; and the Community Chest, Council of America, Inc., New York. In 1953 he received the "First Citizen of Norfolk" award, made by the Cosmopolitan Club. Since November, 1953, Phelan had devoted all of his business time to the affairs of Portsmouth and he intends to continue to do so in the event of a television grant. He has had no experience in television.

17. *Carl J. Burkland.* Vice-President, General Manager, Director, Stockholder, Proposed Trustee. Burkland has lived in the so-called Tidewater area since approximately August 1, 1953. His entire vocational and business career appears to have been in radio, except for some experience in television spot sales. Between 1929 and 1941 he was first an announcer and later salesman, assistant sales manager, and finally sales manager of radio station WCCO, Minneapolis. From October, 1941 to November, 1942 he was on CBS's Radio Spot Sales staff; from November, 1942 to January, 1948 he was Manager of WTOP, Washington, D. C. From January, 1948 to September, 1950 he was General Sales Manager of CBS's Radio and TV Spot Sales; from September, 1950 to July, 1953 he was Director of CBS Station Administration. His membership in civic organizations includes: Boy Scout Fund Drive, New York, 1952; Kiwanis Club, Washington, D. C., 1945—1948; Board of Trade, Washington, D. C., 1946—1948 (Received Award of Merit from Washington Board of Trade in December, 1947); The Washington Manufacturers Representa-

tives Association, 1943—1948; The Minneapolis Manufacturers Representatives Association, 1938—1941; Member of Portsmouth Chamber of Commerce; Member of Norfolk Chamber of Commerce; Member of Norfolk Advertising Club; and Member of Tidewater Sales Executives Club. When Burkland left WTOP in 1948 he was given a testimonial by the Washington Board of Trade "at the largest general membership meeting in our (its) history" for his "outstanding service" as a member of that organization. (Tr. 843)[4] Burkland's history in the broadcasting field (prior to his association with Portsmouth) indicates that he was predominantly in the sales and administrative branches of the industry although, of course, in his general supervisory capacity at WTOP he was charged with establishing station policies and seeing that they were carried out. In addition, at WTOP he was "largely responsible for contact with the community of Washington and with carrying out of whatever the radio station did for the community from both a public service and a commercial point of view" and "maintained regular contacts with our (CBS's) sales agency and with advertising agencies throughout the country." (Tr. 839) The record shows that his relationship to such matters as programming and actual production has been on the executive level. He intends to devote full time to the station.

18. *George T. McLean.* Vice-President, Director, Proposed Trustee. Born in 1898, McLean has been a resident of Portsmouth since birth. It appears that his vocational life has centered mainly in the real estate, contracting, and building-materials businesses. In addition to his interest in this applicant, his recent activities and holdings are reflected in 18 enterprises in the Portsmouth area. He organized the Portsmouth Redevelopment and Housing Authority in 1940 and has served as its chairman continuously; helped organize Portsmouth Sports Club and served

[4] The record does not reveal any cause and effect relationship between Burkland's managership of WTOP and the testimonial to his activities as a member of the Board of Trade.

as its first President; served as President of Portsmouth Community Chest, 1942—1948 inclusive; and has served as Vice-President of the Portsmouth Chamber of Commerce. He was named First Citizen of Portsmouth for 1944; Governor John S. Battle appointed him to the Advisory Council on the Virginia Economy in 1951 and subsequently reappointed him for an additional term of three years to end June 30, 1956. He is a member, Wright Memorial Methodist Church, Portsmouth Chamber of Commerce, Retail Merchants Association, Elks, Moose, Portsmouth Sports Club, American Legion, Elizabeth Manor Golf and Country Club, Portsmouth Assembly, and the Cavalier Club of Virginia Beach. Devoting about 20 hours per week to the station he will be a member of two committees (advisory committees on community and governmental relations) which the applicant intends to establish.

19. *Henry Clay Hofheimer, II.* Secretary-Treasurer, Director, Stockholder, Proposed Trustee. Born in 1906, Hofheimer has lived in Norfolk all his life. His business and civic activities make a list too long to itemize here. He is now a member of the board of trustees or otherwise holds an office in a dozen such organizations or institutions as the Advisory Committee; Norfolk Port Authority; Norfolk General Hospital; YMCA; College of William and Mary. His past connections with similar civic and cultural projects show a history of genuine interest and participation therein. He is an officer and or principal stockholder in twenty-four companies located mostly in Virginia, with some in other parts of the South and in the Southwest. Among them the banking, railroad, building materials, sand and gravel, coal, and oil businesses are represented. He will be on advisory committees on community relations and educational matters. He intends to devote 15 to 20 hours per week to the station's affairs.

20. *R. D. Cooke.* Stockholder, Director, Proposed Trustee. Cooke was born in Norfolk in 1880, and has lived in

Norfolk all his life. He has been engaged in the practice of law in Norfolk since 1902. He was Mayor of Norfolk, 1946—1948 and Councilman of Norfolk, 1946—1950. His membership in civic organizations includes the First Presbyterian Church (Deacon Emeritus); Princess Anne Country Club; Virginia Club; Norfolk Yacht and Country Club; Norfolk-Portsmouth Bar Association (President, 1947 and 1948); United War Fund Campaign (Chairman, 1942); USO Auditorium Committee (Chairman, 1942); Norfolk Protestant Hospital (Director since 1935); Norfolk Community Chest (Member of Executive Committee and Director, 1942-1952, Chairman of 1931, 1941 and 1942 Campaigns); Mary E. Ballantine Home for Old Ladies (Vice President and Board of Directors since 1933); Navy YMCA (Member of Board of Management since 1933); Mary Baldwin College, Staunton, Virginia (Trustee for 10 years). In 1942 he was elected First Citizen of Norfolk. Cooke is a partner of the law firm of Willcox, Cooke, and Willcox; a director of Royster Guano Company, Norfolk, Virginia; a director and less than 25% stockholder in the National Bank of Commerce, Norfolk, Virginia; and president, director, and one-third stockholder of Will-Cooke, Inc., Norfolk, Virginia, (real estate holding company). He will be a member of the advisory committee on community relations and will devote about 15 hours per week to the affairs of the station.

21. *E. T. Gresham.* Director, Stockholder, Proposed Trustee. Born in Indiana in 1892, Gresham has resided in Norfolk for the past 38 years. He has been president and principal stockholder of E. T. Gresham Company, Inc., Norfolk, Virginia, (contractors) for 37 years; a director and less than 25% stockholder of the Commonwealth Natural Gas Corporation, Richmond, Virginia, since 1951; a director and less than 25% stockholder of the National Bank of Commerce, Norfolk, Virginia, for 7 years; and a director of the Virginia Mutual Insurance Company, Richmond, Virginia, for 15 years. He was named First Citizen

of Norfolk in 1951. His religious, cultural, charitable, and kindred affiliations reveal that he has consistently been active in at least twenty institutions or organizations of the type heretofore mentioned in the Norfolk background data of the other principals of both applicants. He will be chairman of the advisory committee on government relations and will devote about 20 hours per week to the affairs of the station.

22. *John C. Aspinwall, Jr.* Stockholder, Director, Proposed Trustee. Born in Norfolk in 1917, Aspinwall Jr. has resided there ever since. During the war he was with the U. S. Navy Supply Corp., serving in the Far Pacific area for approximately 20 months with Service Squadron 10. He is a member of about twenty-five organizations, a majority of which are civic or charitable, and the remainder of which are business associations. He is also a member of the Norfolk Yacht and Country Club. His main business interest appears to be warehousing. As a member of the community and armed services committees of the applicant, he will devote 15 to 20 hours to the station weekly.

23. *William M. Camp.* Stockholder, Director, Proposed Trustee. Born in 1900 in Franklin, Virginia, Camp has resided there ever since except for two periods aggregating 15 years which he spent attending to family business matters in South Carolina. In Marion, S. C. he was Chairman of the Board of Deacons, Marion Baptist Church; member of the School Board for six years; member of the Democratic State Committee; member of the South Carolina State Forestry Commission; member of the Kiwanis Club; Board of Directors; Board of Directors, Boy Scouts District of Eastern South Carolina; and Board of Directors, Marion National Bank. He is a member of approximately thirty business, sporting and social clubs or associations. In addition, Camp has served six years on the Board of Managers of the University Alumni Association of the University of Virginia and is a trustee on the Board for the Woodberry Forest School. He has been chairman of the Franklin

District Democratic Committee for 8 years, has served on community fund drives in Franklin on a number of occasions, and has served as a director for 7 years on the Old Dominion Area Council of the Boy Scouts of America, Suffolk, Virginia. His business interests appear primarily to be in lumbering and products derived from wood. Camp will serve on Portsmouth's religious advisory committee and will devote about 20 hours per week to the affairs of the station.

24. *Joseph W. Luter, Jr.* Stockholder, Director, Proposed Trustee. Luter was born in Smithfield, Virginia, in 1908 and has lived there all his life. He is a member of the following organizations: Trinity Methodist Church, Smithfield, Va., (also trustee of this church); Smithfield German Club, of which he is Past President and is now a member of the Board of Directors; Virginia State Chamber of Commerce; Virginia Manufacturers Association; Board of Directors of Tidewater Wholesale Food Dealers Association; and Farm Bureau Federation of Isle of Wight. Luter formerly belonged to the Rotary Club, but resigned because farm meetings interfered. In 1949 he headed a committee which successfully raised funds to build a community center in Smithfield. He was instrumental in establishing laboratories, since taken over by the Virginia Department of Agriculture, for the study of peanut cultivation and livestock (hog) production. Luter is president of the Smithfield Packing Co., Inc.; president of the Merchants and Farmers Bank of Smithfield; and secretary-treasurer of the Luter Packing Co., Lawrenburg, North Carolina. He has assisted in the establishment of radio farm programs for WAVY-AM and will devote 15 to 20 hours per week to Portsmouth as chairman of the agricultural advisory committee.

25. *Charles K. Hutchens.* Stockholder, Director, Proposed Trustee. Hutchens was born in 1896 in Radford, Virginia and has been a resident of Newport News for 54 years. The record indicates that in recent years he

has been active in about thirteen organizations, institutions, and "drives" such as the Methodist Church, Shriners and Masons, Riverside Hospital, Community Chest, and the Elks. He has a 25 percent or better interest in two automobile sales companies, a bank, a savings association, a toy manufacturing company, and a garment company. He will be a member of the advisory committee on community relations and will devote about fifteen hours weekly to the station.

26. *Porter Hardy, Jr.* Stockholder, Proposed Trustee. Hardy was born in Virginia in 1903 and has lived in the Tidewater area all his life except for a period of employment in New York and a period of five years spent as a wholesaler of electrical equipment in Salisbury, Maryland. However, there is no indication in the record that his legal residence changed from Virginia in these periods. He was graduated from Randolph-Macon College and later attended the Harvard Graduate School of Business Administration. He resides in Churchland, Virginia where he operates a farm. He was elected to the Eightieth and successive Congresses of the United States. He was responsible for the organization of the Norfolk County Farm Bureau and the Association of Virginia Potato and Vegetable Growers. He has held a number of state and federal positions in the field of agriculture. In 1951 he was named First Citizen of Portsmouth. He is a member of the Methodist Church, Moose, Kappa Alpha Fraternity and of other similar organizations. He will be a member of the agricultural advisory committee and the committee on governmental operations. He will devote about 20 hours weekly to the station when Congress is not in session. (Tr. 1992)

27. Beachview has only one class of stock. By resolution reflected in the corporate minutes for October 3, 1953 it was agreed that voting control in the corporation should constitute not less than 85% of the outstanding stock.

28. Portsmouth is also a Virginia corporation whose stock, prior to November 11, 1953, consisted of one class, common voting, with a par value of $50.00. All of the then outstanding shares—2780—were held by 26 stockholders.

29. On November 11, 1953, Portsmouth amended its articles to provide for two classes of stock: Common A non-voting with a par value of $50.00 and Common B voting with a par value of $0.10 (ten cents). (No dividends may be declared on Class B voting in any year before a 6% dividend, non-cumulative, is declared on Class A). Also, on November 11, 1476 shares of common were issued to the original 26 stockholders, and 80 shares to one Carl J. Burkland. Thus, on that date, 100% of all issued shares—4336—was owned by 27 stockholders. The original 26 stockholders of the old common were given a new Class A on a share-for-share basis and were permitted to subscribe for the same amounts of new Class B voting as Class A received in exchange for the old stock. By November 16 the number of stockholders had risen from 26 to 61 and the number of shares of common subscribed for had risen from 2780 of the old common (as of July, 1953) to 17,034 of the new Class B voting.

30. On January 26, 1954 Portsmouth made its first issuance of the new Class B voting in the amount of 8,107 shares: 5,082, or 62.6%, to the original 26 subscribers or their successors, and 3,025 shares, or 37.4% to 35 new subscribers.[5]

31. Portsmouth's ultimate issuance of the 17,034 shares of Class B subscribed (less the 8,107 issued January 26) is to occur if and when a construction permit for a VHF Channel is awarded the applicant. Upon such issuance, 10,404 shares, or 61.04%, will be held by the original

[5] One of the original 26 stockholders had died and his stock was held by his executrix. Another withdrew from the corporation and his stock was retired. However, on November 11, an additional stockholder was admitted who, for practical purposes, can be considered as one of the original 26. Thus, the number of "new" stockholders is placed at 35.

26 stockholders or their successors in interest and 6,630 shares, or 38.96%, will be held by the 35 new stockholders.

32. All of Portsmouth's subscribers to the Class B voting stock entered into a Voting Trust Agreement with eleven of the stock subscribers, as Trustees, whereby all agreed that, subject to the prior consent of the Commission, they would transfer their Class B voting stock in trust to the Trustees for voting upon all matters coming before the stockholders. The beneficial interest in the stock is to be retained by the Class B stockholders who will receive transferable Trustees' Certificates in lieu of their stock certificates. The trust is to remain in full force and effect until November 11, 1956 and is automatically extended for successive one-year periods thereafter unless a majority of the holders of the shares represented by the Trustees' Certificates vote to terminate the trust and consent to such termination, if required, is obtained from the Commission.

33. Portsmouth has authorized the issuance of a total of 25,000 shares of Class B voting. Existing options to purchase, held by two of the eleven trustees would, if exercised, result in a total of 19,584 shares being held and voted[6] by the eleven trustees.

34. Counsel for Portsmouth stipulated "that there are no specific provisions governing who may or may not acquire the balance of the Class B stock up to the authorized amount, but over and above the amount subscribed to and for which there are options." (Tr. 1949) It is possible, then, for the eleven voting trustees to cause to have issued to some or all of their number the remaining 5,416 shares.

35. The table below identifies the eleven trustees by names, offices, and amounts of stock they will hold when a construction permit is issued.

[6] Either on an ownership or trusteeship basis.

Name	Office Held	Class A Shares	Class B Shares	Percentage
Trustees:				
Hunter C. Phelan*	Pres., Director	520	520	3.05
Carl J. Burkland*	Vice-Pres., Gen. Mgr., Dir.	280	280	1.64
George T. McLean	2nd Vice-Pres., Dir.	2040	2040	11.97
Henry Clay Hofheimer, II	Secy.-Treas., Dir.	1340	1340	7.86
R. D. Cooke	Director	140	140	0.82
E. T. Gresham	Director	400	400	2.34
J. C. Aspinwall, Jr.	Director	200	200	1.17
William M. Camp	Director	500	500	2.93
Joseph W. Luter, Jr.	Director	440	440	2.58
C. K. Hutchens	Director	200	200	1.17
Porter Hardy, Jr.[7]				

* Under certain conditions, Phelan and Burkland shall have the right to purchase 1700 and 850 additional shares, respectively, of Class B stock at ten cents ($.10) per share, if a permit is granted.

36. Should the eleven trustees cause to have issued to some or all of their number the remaining 5,416 shares (mentioned in paragraph 34, supra) they would then have majority control (57.5 percent) of the authorized voting stock, irrespective of their control derived from the Voting Trust Agreement.

37. The 35 new stockholders brought in as of January 26, 1954 reduced the percentage of holdings of voting stock by the original 26 stockholders (as of November 11, 1953) from 100 percent to 62.6 percent. When a construction permit shall be issued, the percent of stock that will be held by the original 26 stockholders shall be 61.04 percent. Although this is a considerable reduction in degree of control, control is and shall be continued in the original stockholders. (See paragraph 51, infra.) This finding is made on the basis of stock ownership and not on the basis of any effects flowing from the Voting Trust Agreement.

38. Portsmouth Radio Corporation is the licensee of Station WAVY, Portsmouth, Virginia.

[7] Porty Hardy, Jr. was elected a director on January 16, 1954. A petition for leave to amend the application to reflect his election was denied by the Examiner on February 9, 1954 and by the Commission on March 26, 1954.

39. Official notice is taken of the fact that, on June 16, 1954 the Commission approved transfer of control of Portsmouth to the eleven voting trustees. (See paragraph 32, supra.)

40. John C. Aspinwall, Jr. is a stockholder, director, and proposed voting trustee of Portsmouth. John C. Aspinwall, Sr. is his father; M. F. Aspinwall is his brother. The latter two are also stockholders of Portsmouth. Aspinwall, Jr. was president of Tidewater Telecasting Corporation (Tidewater), formerly an applicant for the instant channel, and as such signed an application filed with this Commission (BPCT-1601). The stock held by Aspinwall, Jr. in Tidewater was held in behalf of himself, his father, and his brother.

41. In the aforementioned Tidewater application, M. F. Aspinwall and John C. Aspinwall, Sr. are not listed as stockholders. In answering the question set forth in Section 2, Page 3, Paragraph 13 of the Tidewater application—"In connection with the stockholders and stock subscribers named in Table I to this form, is the beneficial owner of the stock a person other than the owner of record or subscriber?"—the answer given was "No." In Section 2, Page 5, Question 21 of that application no indication is given of the relationship between Aspinwall, Jr., on the one hand, and his father and brother, on the other hand, for whom Aspinwall, Jr. was holding stock.

42. Eight of Portsmouth's 35 new subscribers who came in on or about November 16, 1953 were principals of Tidewater, whose application for Channel 10 was dismissed on November 19, 1953, pursuant to request dated November 18, 1953.

43. At or about the time Tidewater's application was dismissed, another application for Channel 10, that of Chesapeake Services, Inc. (Chesapeake) was also withdrawn. On the condition that the stockholders of these two applicants would not participate in any application in

competition with Portsmouth, Portsmouth agreed to reimburse both Tidewater and Chesapeake for out-of-pocket expenses incurred in prosecuting their applications.

44. Portsmouth further agreed to pay Tidewater an additional $2500 as reimbursement to Louis Peterson, its president, for personal out-of-pocket expenses incurred in prosecuting the Tidewater application when and if Portsmouth should receive a construction permit for a VHF television channel.

45. Three of the eight subscribers mentioned in paragraph 42, supra, were J. C. Aspinwall, Jr., E. T. Gresham, and R. D. Cooke, who subscribed for their Portsmouth stock and were elected directors of Portsmouth prior to November 16, 1953 while they were still officers and stockholders in Tidewater.

46. On November 16, 1953 these three men—acting as directors of Portsmouth—attended a Portsmouth Board of Directors meeting and voted with six other directors[8] to reimburse Tidewater as indicated in paragraphs 43 and 44, supra. Thus, they participated in disbursing Portsmouth funds to reimburse themselves.

47. Kipnes' stock in Cavalier (see paragraph 6, supra), for which he had paid $500, amounted to 10 percent of all Cavalier stock. He also held options to purchase up to 35 percent of Cavalier out of the earnings of the station. After having tried repeatedly and unsuccessfully to get the corporation to redeem his stock, he, by letter, advised the attorney[9] for the principal stockholder of Cavalier that he (Kipnes) had an offer from the Communist Party to purchase his stock for $1800 or $2000; that he did not want to sell to them (the Communist Party), but if Cavalier

[8] The minutes of the meeting show that only nine of the corporation's eleven directors were present.

[9] Morris D. Schwartz. The deportment and testimony of Mr. Schwartz are persuasive of his desire to testify only to what he considered the facts and not to conjecture or indulge his imagination. While called by Portsmouth, he was obviously a neutral witness.

would meet his terms or similar terms, Cavalier could buy it. In subsequent telephone conversations Kipnes stated to this attorney (who had become Secretary of Cavalier) that he was reluctant to do anything that would hurt Cavalier in any way; that, on the other hand, if Cavalier wouldn't buy the stock, he was inclined to go along with the offer of the Communist Party.

48. While it is not contested that Kipnes was "voted out" of Cavalier, the record of the proceeding does not supply reliable evidentiary materials upon which to make findings of fact as to the cause, or causes, therefor. The events mentioned in the paragraph next above, occurring quite some time after his departure from Cavalier, could have had no bearing upon his leaving Cavalier.

49. Section II, Page 5, Paragraph 19 of FCC Form 301 asks the question: "Does applicant or any party to this application have now, or has applicant or any such party had, any interest in, or connection with, the following . . . any standard, FM, or television broadcast station?" The Portsmouth application answers the question "No." None of Burkland's employment with CBS was shown in the application.

50. Before proceeding with findings of additional basic facts, certain contentions of the parties may be disposed of at this point by referring to and discussing the above findings and coming to final factual conclusions thereon. Each applicant asserts that preference is due it on the basis of local residence of stockholders. Over ninety-eight percent of Beachview's stock is held or subscribed by six persons who are or have been residents of Norfolk (most of them for long periods of time); the remainder of its stock has been subscribed by two persons who have resided in Washington, D. C. Of the eleven voting trustees of Portsmouth who shall have complete control over Portsmouth, only two, Luter (of Smithfield) and Burkland (who recently became a resident of Portsmouth) have not been

life-long or long-time residents of the Norfolk-Portsmouth-Newport News metropolitan or suburban areas, and the business activities of all except Luter are centered in these areas. No special significance relating to residence can be attached to the fact that Portsmouth plans to have its studio in the city of Portsmouth. The record contains no reliable data supporting the contention of either party that it deserves preference on this score; rather, the basic facts in the foregoing paragraphs show that both parties are substantially on a par respecting local residence, and it is so found.[10]

51. Beachview asserts as a point of reliance that the issuance of the 8,107 shares of Class B stock on January 26, 1954 (see paragraphs 30, 31, supra) effected a transfer of control of the corporation without prior consent of the Commission and without complying with Commission Rules and Regulations relating to transfer of control; that such conduct reflects adversely upon the character and background of Portsmouth as an applicant and upon the individuals associated therewith. Between July 10, 1953 and January 26, 1954, the total fluctuation in the ownership of stock held by the original group (or their successors in interest) amounted to 49.48 percent, but it does not appear that at any time during this period any one stockholder or alignment of stockholders attempted to exercise control against a minority alignment. No single stockholder held a majority interest. Within this period the holdings of Hofheimer decreased from 14.75 percent of the total to 12.79 percent, while McLean's increased from 5.35 percent to 19.87 percent of the then total. Beachview correctly maintains that after the issuance of the 8,107 shares, the number of these (37.4 percent) issued to the 35 new stockholders plus the shares that had shifted among the original stockholders would be sufficient to control

[10] The residences of the fifty Portsmouth stockholders who have turned over their voting rights to the eleven trustees are irrelevant; but, if such residences were relevant and considered herein, the factual result would still show no possibility of preference.

the corporation. Beachview reasons that the stock of McLean alone (12.33 percent of the total after January 26) plus the shares to the new stockholders (37.4 percent) together with as little as 3 percent of the original stockholdings, could control the corporation. Hence, Beachview infers that McLean and the new stockholders plus any one original stockholder with as little as .3 percent are now in control without consent of the Commission. Beachview has laid no predicate for transfer of control except that of abstract mathematical probability. Obviously, it can be found that transfer of control is a potentiality that could become an actuality if any one of a number of possible stock realignments should become a hard fact. For that matter, mathematically, various alignments prior to January 26 could have occurred with resulting permutations of control within the original group. But no actual alignments or realignments with resulting permutations of control prior to January 26 are alleged or even hinted at by Beachview, and none is inferable from the record in this proceeding. Rather, there is acceptance of the proposition that the original stockholders, prior to January 26, were a homogeneous group insofar as control was concerned. No reason has been advanced why that acceptance should be disturbed. In view of the fact that the original stockholders (or their successors in interest) still held a majority of the voting stock after the issuance of the 8,107 shares on January 26 and there being no overt act or other indication that the potentiality noted above became an actuality, it is found as a matter of fact that no transfer of control took place. (See paragraph 37, supra.) Hence, Beachview's point of reliance must fail.

52. Beachview asserts as a point of reliance that Aspinwall, Jr.'s failure to indicate in the Tidewater application (see paragraphs 40, 41, supra) that he held stock beneficially in Tidewater reflects adversely on the character and background of these three individuals, all of whom are stockholders in Portsmouth. It is found—and counsel

for Portsmouth admits that the interests of Aspinwall, Jr.'s father and brother should have been reported to the Commission. But it does not follow that the failure to report their interests should reflect adversely upon the characters and backgrounds of these individuals. First, there is no indication that M. F. Aspinwall (the brother) or Aspinwall, Sr. knew of or participated in the misstatement, nor is there any showing that these two should have been diligent in apprising themselves of each detailed statement in the application. Second, Aspinwall, Jr. considered the matter a family affair. He testified ". . . we usually do everything together, if you know what I mean; and I am acting in behalf of my family." (Tr. 1603) It is notorious that families often act as units and overlook, or are ignorant of, or feel that, since "it's all in the family" so to speak, they need not abide as closely by formal requirements regarding property as they should. Third, as a witness, Aspinwall, Jr. was frank and appeared to be desirous of telling the truth about the matter; there was no indication by demeanor or testimony that could lead to the conclusion that he willingly filed the application—knowing that it contained a misstatement—with the intention of deceiving the Commission in a matter about which the Commission had a right to know the truth. Fourth, as a matter of fact the stock was never divided among the three. By no means do these factors excuse the misstatement made by Aspinwall, Jr., but they should mitigate against censure as strict as Beachview would have it. Consequently, it is not found that the misstatement reflects adversely upon the characters and backgrounds of John C. Aspinwall, Jr., John C. Aspinwall, Sr., and M. F. Aspinwall. Hence, Beachview's point of reliance must fail.

53. In three points of reliance, Beachview maintains that the facts set forth in paragraphs 42, 43, 44, 45, and 46 supra, reflect adversely upon the character and background of Portsmouth as an applicant and upon those of the individuals associated therewith. Beachview does not con-

tend that the facts show illegal action on the part of Portsmouth or any one associated with it. The questions would appear to be, first, whether it was improper for officials and stockholders of Tidewater to be elected directors of Portsmouth and subscribe for stock therein within a space of eight days prior to the dismissal of the Tidewater application; second, whether it was improper, in the face of a fiduciary relationship existing between these new directors of Portsmouth and the other stockholders of Portsmouth, for the new directors to vote to reimburse Tidewater (paragraphs 43, 44, 46); and, third, whether the alleged restrictions placed upon the stockholders of Chesapeake and Tidewater and payment conditioned upon a grant (paragraphs 43, 44) are contrary to the public interest.

54. Discussion and findings relating to the questions in paragraph 53 (and to the basic facts which arouse them) pertain exclusively to these matters as they appear in this proceeding and may not be construed as generalizations. The three questions in paragraph 53 are hereby answered "No," and for reasons following in paragraphs 55, 56, 57, 58 and 59, it is found that the facts set forth in paragraphs 42, 43, 44, 45, and 46 do not reflect adversely upon the characters and backgrounds of Portsmouth and the individuals associated therewith.[11]

55. The shortness of the space of time between the election of Tidewater's three directors to Portsmouth's Board and the dismissal of Tidewater's application shows that these two events were part of a pre-existing pattern of action to consolidate the forces which ultimately were to compose the Portsmouth group. To insist that a grave impropriety occurred because these directors were still directors of Tidewater prior to November 19, when the Tidewater application was dismissed, is to be hyper-conscious of the chronological separateness of events which, business-wise, may be deemed to have sprung into being

[11] Which is not the same as finding that the events which took place should be happily viewed by the Commission.

simultaneously. It must be remembered that Tidewater was in a position to have its application dismissed as a matter of right.

56. The fact that eight persons, formerly stockholders in Tidewater, subscribed to Portsmouth stock while the application of Tidewater was still pending is answerable on the same basis as the election of the directors. (See paragraph next above.)

57. Counsel for Beachview does not contend that there was a breach of a fiduciary relationship between the three new directors of Portsmouth and the stockholders of Portsmouth, but only that the actions of the new directors should reflect adversely upon the characters and backgrounds of Portsmouth and the individuals associated therewith. Certainly, in sufficiently analogous situations, interlocking directors vote on business transactions among the separate business entities of which they are directors. Such transactions are not suspect per se. Neither the directors involved nor the transactions themselves should be condemned, in the absence of a design to injure or defraud the stockholders. There is no charge or indication of anything like that in this case. The action of Portsmouth's directors was unanimous; there is no charge or indication that the three new directors coerced the nature of the vote of the other six directors present; there is no charge or indication of dissatisfaction on the part of Portsmouth's stockholders; there is no charge or indication that in terms of dismissal practices then or previously current in the industry, the transaction was not a "good deal" for Portsmouth. In short, Beachview has failed in its burden of establishing facts to support the adverse finding it seeks regarding the actions of the three new directors.

58. Beachview's point of reliance respecting the nonparticipation of stockholders of Chesapeake and Tidewater in a television application in opposition to Ports-

mouth as a condition of reimbursement does not state that a legally enforceable contract was made. However, at page 97 of Beachview's proposed findings, it is stated that ". . . Portsmouth has restrained the individuals associated with such corporations from freely associating with any applicant that might be in competition with Portsmouth." This statement has the ring of a conclusion of law, but the legal effect of reimbursement under the instant conditions is not before the Commission. On the other hand, if Beachview is contending that restraint as a fact has occurred, it has not been demonstrated. It is self-evident that neither the ex-stockholders of Tidewater nor Chesapeake were restrained from joining with the other's application in competition with Portsmouth, for the reason that Portsmouth's resolutions respecting these applicants were passed at the same Board meeting. No evidence of even the most tenuous nature was brought forth to show that any of the ex-stockholders attempted to or had any inclination to become associated with Beachview or Hampton Roads Broadcasting Corporation (a former applicant for this facility). Contract cases involving restraints upon competition reach the courts as a result of litigation generally initiated by an allegedly aggrieved party. These cases are decided upon the bases of whether there is restraint and, if so, whether the restraint has been unreasonable in the premises. They are decided on a case-to-case basis according to the facts peculiar to the transaction. That would seem to be the process applicable here, for there is nothing in the facts found or in the arguments advanced to warrant a Commission pronouncement that reimbursement as found here is always and everywhere contrary to the public interest. Beachview has not shown actual restraint, nor has it shown that the local public interest has been disserved. The main argument advanced by Beachview that the alleged restraint prevents the freest possible association of persons who may desire to seek available radio and tele-

vision facilities overlooks the following facts: that they did exercise that right when they associated together in the first instance; that they were not forced to sell their stock (so far as the record indicates); and that blind adherence to the doctrine of the freest possible association of persons, etc. may itself be contrary to a given local public interest in that it could permit hopscotching by stockholders for personal gain.[11a]

59. Beachview contends that the promise of payment to Louis Peterson (Tidewater's former president) of $2500 is particularly contrary to the public interest, saying "Such a situation, if condoned as a matter of principle, could conceivably defeat the Commission's hearing procedure by reason of actions or efforts on the part of individuals, not parties to a proceeding, who may have a financial interest in the outcome." (Beachview's proposed findings, page 121.) This view is so highly speculative of remote machinations and so pessimistic of the Commission's hearing procedures as to warrant little or no consideration when weighing the comparative merits of these two competing applicants. The instant transaction is viewed herein as one in which Portsmouth merely says to Peterson (Tidewater) "If we get a grant, then we can feel justified in making an expenditure to you equivalent to what you have already spent in the preparation and presentation of your application." As such, it does not reflect adversely upon Portsmouth or the individuals associated with Portsmouth.

60. Portsmouth asserts no point of reliance which gives relevance to the testimony of Attorney Morris D. Schwartz from which are drawn the basic facts noted in paragraph 47, supra. Even if the testimony were relevant, it is so lacking in definition (perhaps out of the witness's desire

[11a] It must not be inferred that there is the slightest trace of that sort of thing involved in the history of this case.

to be truthful) as to have no decisional value. Consequently no finding therefrom is possible.[12]

61. Under a point of reliance, Beachview maintains that the failure of Portsmouth to show the "connection" of Burkland to CBS in the application form (see paragraph 49) reflects adversely upon the character and background of Portsmouth. Burkland was never an officer, director, or stockholder in CBS (so far as the record shows). He was never on a policy level with CBS. He was only an employee of CBS, albeit at times on the executive level. The word "connection" in the application is not used so comprehensively as to betoken a connection purely on the employee-employer level. Hence, there was no requirement for Burkland's employment with CBS to be remarked in the application and no adverse criticism can ensue.

62. In an amendment filed on November 18, 1953 Portsmouth failed to reflect that the eight stockholders mentioned in paragraph 56, supra, were still stockholders in Tidewater. Beachview maintains in a point of reliance that this failure to disclose that information reflects adversely on Portsmouth and the persons associated therewith. The petition to dismiss the Tidewater application was filed on the same day as Portsmouth's amendment (November 18) and was dismissed as a matter of right the following day. For the general reason shown in paragraph 55, supra, and for the further reason that requiring disclosure of these stockholders would be requiring a futile

[12] It is imperative to remember that this case was tried under the "points of reliance" practice at a time when strict specificity was observed in alleging the bases of preference. The "ground rules" of this proceeding permitted the addition of points of reliance during the progress of the hearing but, whereas Beachview added points relating to the characters and backgrounds of named individuals associated with Portsmouth, Portsmouth did not at any time avail itself of its right to add a point relating to Kipnes's character or background. It would be flagrant error to consider such testimony pertinent to the issues in this proceeding after the issues have been circumscribed and delimited by preclusive points of reliance. Insofar as any reference to the Communist Party is concerned, the testimony of Schwartz was stricken by the Examiner; but on request for reconsideration by counsel for Portsmouth, counsel for Beachview stated his opinion of Portsmouth's purpose in eliciting the testimony and withdrew his objection to it. Otherwise it would not even be mentioned in this decision. (See transcript, pp. 1298-1302.)

act and might even tend to confuse the status of the petition to dismiss or the petition to amend, it is found that the technical fault of failing to disclose should not reflect adversely upon the characters and backgrounds of Portsmouth and the individuals associated therewith.

63. Under a point of reliance, Beachview in a November 18, 1953 amendment contends that Portsmouth made a misstatement of fact to the Commission with its answer of "No" to the question (22 d of form 301, Section II, page 5) which asks "Are there any documents, instruments, contracts, or understandings relating to ownership, management, use or control of the station or facilities, or any right or interest therein?" In view of the fact that a stock subscription agreement and the voting trust agreement (see paragraph 32, supra), constituting "documents, instruments," etc., were attached to the amendment it is obvious that Portsmouth construed the question to mean documents, etc., other than those presented. It cannot be found, under the circumstances, that there was a misstatement to the Commission.

64. Under a point of reliance, Beachview contends that Portsmouth has supplied mutually conflicting statements of fact to the Commission respecting stock held and stock issued. A November 24, 1953 amendment to the Portsmouth application referred to Class A stock "now held" whereas in fact such stock was not issued until January, 1954. The stock referred to as "held" was obviously the original common stock which the old stockholders had the right to exchange share-for-share for the Class A stock. (See paragraph 29, supra.) Counsel for Portsmouth admits that "referring to the Class A stock as 'now held' was perhaps technically in error. . . ." (Portsmouth proposed findings, page 4) It is found that such reference was in error; but it is also found that with the changing stock complexion of the applicant the designation "now held" was not wholly inapt since it referred to an

imminent state of being flowing from a vested right. There is no showing that Portsmouth's designation of the stock was the result of an intention to deceive the Commission on a material fact regarding the type of stock holdings. Consequently it is found that the use of the words "now held" does not reflect adversely upon the characters and backgrounds of Portsmouth and the persons associated therewith.

65. The record reflects and Burkland admits that he had an understanding with Portsmouth prior to August 3, 1953 (the date of filing of the instant application of Portsmouth) that he was to be the manager of the station and a stockholder in the corporation. Yet these facts are not set forth as required by FCC form 301 (22 d re ownership and control of station). Insofar as the factual record is concerned, no explanation is present for not showing the understanding. Under the circumstances of this case, the failure to mention the understanding and to give the Commission its substance, even broadly, is probably a mere peccadillo of little or no consequence; nevertheless, being entirely lacking in justification, it must be considered as reflecting adversely upon Portsmouth.[13]

66. There are no facts of significance[14] other than those already given which bear upon Beachview's points of reliance 12, 13, 14, 15, 17, 18, and 19 dealing with backgrounds and characters of Portsmouth and the persons associated therewith. Beachview points 2, 11, 16, and 20 will be considered together hereinafter. (Paragraphs 104-108 inc.)

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[13] Counsel for Portsmouth contends that Burkland's understanding was not shown because specific details were not worked out until November. This is an advocate's "explanation," given after the facts are in, and without support in the record.

[14] Beachview makes a contention that Portsmouth failed at one time to show the names of stockholders owning as much as 3% of Portsmouth's stock. There is a strong probability of merit in the contention but the record is not in shape to support the contention to a degree worthy of extended mention herein.

III

Findings of Fact — Programming

67. Beachview proposes an independent operation—that is, it will not be affiliated with a network—and asserts this fact as a point of reliance. No basic factual data outside the scope of programming and preparations therefor are given in support of the point and consequently no basic facts can be found thereon except as such facts are found hereinafter with respect to programming and preparations therefor.

68. Portsmouth proposes a network affiliation with NBC if it can get it; an independent operation if it cannot. NBC presently is affiliated with a UHF channel in the immediate area. Portsmouth presents separate program plans and schedules for each kind of operation. Analysis of the network affiliation operation reveals good, adequate programming. This is a general factual conclusion and it is all that is proper under the circumstances. If basic facts of the network affiliation programming were spelled out and the result should denote programming superiority over Beachview,[15] and this result should be a determinant in the Commission's selection of Portsmouth over Beachview, the Commission would find itself automatically applying rather powerful suasion to NBC to drop its UHF outlet and affiliate with the new VHF outlet. Realism compels accepting the fact that this would be tantamount to telling the UHF station to get out of business. The only proper program comparisons which can be made are of the "independent" or "local" proposals.

[15] Under the circumstances, no such inference can be drawn, of course.

69. The applicants propose allocations of program time, by types, as follows:

Beachview		Portsmouth	
Type	Percentage	Type	Percentage
Entertainment	61.67%	Entertainment	45.53%
Religious	4.39	Religious	4.24
Agricultural	5.26	Agricultural	4.31
Educational	8.16	Educational	3.93
News	8.33	News	6.63
Discussion	8.68	Discussion	5.55
Talks	3.51	Talks	27.65
		Marine Reports	1.62
		Defense Service	0.54

70. The program log analysis of Beachview's program schedule reflects:

	8 AM-6 PM	6 PM-11 PM	All Other Hours	Total
Film Commercial	26.00	37.14	88.34	37.29
Film Sustaining	6.16	0.72	—	2.89
Wire Sustaining	—	—	5.83	0.61
Live Commercial	39.50	32.14	—	32.63
Live Sustaining	28.34	30.00	5.83	26.58
Total Commercial	62.50	69.28	88.34	69.92
Total Sustaining	34.50	30.72	11.66	30.08
Complete Total	100.00%	100.00%	100.00%	100.00%
No. of Spot Announcements	240	158	64	462
No. of Non-Commercial Spot Announcements	105	61	30	196

71. Beachview will limit its commercial continuity in participating programs to two 1-minute spot announcements during a 15-minute period, and professes that in this and all other respects it will conform to the applicable provisions of the NARTB-TV Code. Being undisputed, these are found to be basic facts.

72. Beachview has a firm policy that at least 30 percent of its programs will be presented on a sustaining basis Religious and educational programs will not be commercialized.

73. Analysis of Portsmouth's independent schedule follows:

	8 AM-6 PM	6 PM-11 PM	All Other Hours	Total
Recorded Commercial	31.27	61.43	55.00	43.22
Recorded Sustaining	2.77	1.43	5.83	2.62
Wire Commercial	3.83	4.76	10.00	4.70
Wire Sustaining	—	—	10.84	1.00
Live Commercial	42.48	13.81	5.83	29.82
Live Sustaining	19.65	18.57	12.50	18.64
Total Commercial	77.57	80.00	70.83	77.73
Total Sustaining	22.43	20.00	29.17	22.27
Complete Total	100.00%	100.00%	100.00%	100.00%
Proposed Broadcast Hours	62' 10"	35'	11'	108' 10"
No. of Spot Announcements	225	125	35	385
No. of Non-Commercial Spot Announcements	95	60	20	175

74. Although 77.73 percent commercial is shown for Portsmouth, it appears that the applicant has no established policy as to the maximum amount of commercial time. Hofheimer testified it was planned that between 75 to 80 percent of the program time would be commercial. He testified that he regarded this as a commitment to the Commission, but that if the station were losing money (Tr. 1322):

> "It certainly would be prudent business policy to discuss with the Commission changing that. But as far as I can see we should have enough revenue to operate on a 75 to 80 percent basis."

At the time of the hearing, Portsmouth had not established a definite rate card.

75. Beachview will devote 59.21 percent of its total time to local live programs; Portsmouth will devote 48.46 percent.

76. Each applicant alleges that its (local) programs will be "distinctive." Beachview's witnesses were not questioned as to the meaning of this term in relation to

its programs, but Portsmouth's witnesses were examined by Beachview's counsel with negative results for Portsmouth. Portsmouth's witnesses either could find no application for the term to their programs or didn't know what the term meant as descriptive of the programs. In this connection, as well as in other testimonial respects concerning programs and policies, Portsmouth was at a decided disadvantage because the author of a number of exhibits which would normally be of the utmost significance was, at the time of the hearing, no longer employed by Portsmouth and the witnesses (chiefly Burkland) who attempted to testify concerning exhibits which had not been prepared by them or under their direction were, in many respects woefully unfamiliar with the contents of the exhibits and unable to interpret them.[16]

77. The adjective "distinctive" as used in the points of reliance (it is used three times in Portsmouth's point II) is conclusional and undefined and there is nothing in the record to indicate that its use is justified by either applicant. On their faces, there is no marked dissimilarity in the applicants' programs as such.

78. Beachview proposes five religious programs "Let Us Pray," "Mid-Day Chapel," "The Lord's Prayer," "On the Church Scene," and " In The Pastor's Study," to be telecast at regular intervals. These programs are correlated with the faiths of the area to be served. Early contacts (Fall of 1953) were made by Hirschbiel with the representatives of the faiths concerned and cooperation was assured.

79. Beachview proposes seven regular programs which it classifies as education. Two of these ("Little Red School House of the Air" and "The Professor Speaks")

[16] There is no need to go into the employment disagreement which terminated in this unfortunate result. Nor is any reflection meant against the witnesses who valiantly tried to "carry on." The situation is mentioned only because of the almost impossible task of trying to determine what is probative, for example, in the major areas of Burkland's testimony.

are daily, Monday through Friday, the others weekly. These programs are "Festival of Music"—featuring a choral group from the Booker T. Washington High School (Colored) and commentaries by the choral director of the School; "Book Reviews"—a fifteen minute segment of a longer show — presented in cooperation with the Public Library with the assistance of local educators; "Little Red School House of the Air"—featuring demonstration of classroom techniques and teaching methods in major high school subjects as well as featuring demonstrations of special projects; "The Professor Speaks"—featuring full credit courses in Child Psychology and Literature by the Norfolk Branch of the College of William and Mary; "What In The World"—featuring a panel quiz with students from two different schools competing (in cooperation with the Superintendent of Schools of Norfolk County) in a number of regular school subjects; "Careers Unlimited"—featuring vocational guidance to high school seniors by representatives of various professional, artistic, and vocational walks of life; "The Dramatic Workshop Of The Air"—featuring production via television of original scripts, classics, or works of contemporaries (in conjunction with the Norfolk Branch of William and Mary's Drama and Music department).

80. It is undisputed that the programs mentioned in paragraph 79 are the result of early and continued contacts made by Beachview's educational expert, Akers, and were developed by him in consultation with reputable and qualified educators and others in the area and it is so found.

81. In addition to the programs listed in the paragraph next above by the applicant as "educational,"[17] Beachview will produce, Monday through Saturday, a semi-educational feature called "Miss Ruth Anne's Kinder-

[17] Both the applicants show some programming as "educational" which might not, strictly speaking, be so classified by the Commission. Since actual content is the standard of comparison, any minor deviation from strict clas-

garten." The record shows and it is undisputed that this feature has been successfully produced elsewhere. It provides opportunities for learning through play and is designed for mothers (especially) to observe children in groups, thus bettering their techniques in the handling of their own children in their very early years. (See biography of Ruth Anne Flaherty.)

82. Beachview will produce four regular agricultural programs: "Report To The Farmer"—a 15 minute Sunday program of weather forecast and farm news; "Tidewater Farm And Home Hour"—featuring (daily, Monday through Friday) farm and market reports, interviews with agricultural specialists, and matters such as demonstrations of new farm machinery and techniques; "Stock And Crop Aids"—a 15 minute daily evening program featuring latest farm news, market quotations, and weather forecast; and an hour-long Saturday version of "Tidewater Farm And Home Hour" on an expanded scale with specialists in the various branches of agriculture appearing as guests.

83. Detailed description of Beachview's news programs is not necessary. The applicant will devote 5 hours, forty minutes directly to newscasts: 30 minutes per week to specialized weather reports, which are in fact news; 30 minutes a week to a news program specifically prepared by and presented for high school students, and 15 minutes a week to a discussion of news events by nationally known personalities.

84. Beachview will present eleven regular discussion programs weekly: "The World At Issue"—a round-table forum on national and international events; "Tidewater Billboard"—a calendar of social and civic events; "Your Family's Health"—a program to be presented by the Norfolk County Medical Society; "Jaycee Forum"—discussions of local topics of interest under sponsorship of the South Norfolk Junior Chamber of Commerce; "Report

To Veterans''—discussions of veterans' affairs in cooperation with local veterans' organizations; "Report From The City Council"—a question and answer program involving the News Editor of the station and city officials; "Your Ports In Action"—a program in cooperation with and involving the functions of the Norfolk Port Authority and the Virginia Port Authority; "Safety Circus"—a program to develop safety habits in children, presented in cooperation with the Norfolk Director of Public Safety; "Community Action"—a report by the Norfolk Chamber of Commerce on community affairs in which it is interested; "Calling Your Police And Fire Departments"—a survey of the week's activities of these two departments with the presenting of an award to the week's outstanding member of each department; "Hobbies Unlimited"—discussions of hobbies presented by various local organizations interested therein.

85. Beachview will telecast two regular armed forces programs, "Your United States Navy" and "Calling Home." The former will feature news and discussions of projects under the command of the Fifth Naval District (insofar as security will permit) and the latter program will permit persons in the armed forces to appear on the show and call their families in other parts of the country.

86. Portsmouth's regular religious programs comprise daily sign-on and sign-off prayers; a 15 minute program, Monday through Friday, of devotions and sacred music; and two remote broadcasts each Sunday from the same church—one of the Sunday School and one of the adult church service.

87. Portsmouth will intersperse its broadcast day with agricultural and marine weather reports. (Both Beachview and Portsmouth recognize the importance of such reports to the Tidewater Area.) This applicant will also telecast daily except Sunday a 30 minute agricultural program called "WAVY-TV Farm Bureau" containing

market reports, general farm news, quotations, demonstrations of techniques, etc. This will generally be a live studio presentation but film will occasionally be used, especially on Saturdays when either by remote or film an actual farming operation will be covered at the scene. Portsmouth will have experimental farm projects available as program source material.

88. Monday through Friday, Portsmouth will offer "Education At Home"—a 30 minute program whose general format was worked out in conjunction with prominent educators in the area. Included will be young peoples' book reviews, debating on current events, a fine arts and crafts series, a series on health and hygiene, a series on music and choral work and a series on history and science. Also to be telecast by Portsmouth are the following: "Adult Education Series"—featuring, with the cooperation of the College of William and Mary, Norfolk Division, and VPI, lectures and other presentations on music and the liberal arts; "Davy Crockett"—featuring literature, designed for the young, on the American pioneer period and presented in conjunction with the Portsmouth Public Library; "The World We Live In"—featuring aspects of science in cooperation with the Norfolk Public Library; and "One Man Show"—featuring displays and discussions of the works of artists and craftsmen. This latter show will be presented with the cooperation of the Norfolk Museum of Fine Arts.

89. Portsmouth will produce a show, Monday through Friday, called "Saclant Special" consisting in discussions,[18] interviews, and demonstrations designed to acclimate socially newly-arrived service personnel to the area. On Sundays, Portsmouth will originate a half-hour remote program, "Sail Loft," concerned with the dry-

[18] "Saclant" is derived from Supreme Allied Command Of The Atlantic.

docking operations of the area, with emphasis on Navy activity.[19]

90. Portsmouth will broadcast what it calls a full schedule of regular newscasts throughout the broadcast day. This is the type of short newscast so familiar as to require no special description. Additionally, the applicant will broadcast on Sundays a 15 minute film program entitled "Tidewater Looks At Washington" intended to cover the activities of the area's Congressmen, Tidewater visitors to Washington, and Federal officials of interest to the area. There is also a Saturday version of this program. Portsmouth also will broadcast "Seven Days of History"—a Sunday show consisting of the week's news highlights supported by documentary film. There are also a 30 minute Friday program, "Ship And Ports," and a 15 minute Saturday program, "Men And Ships," both of which are sea news features involving the area's ports and will be offered in cooperation with the port authorities.

91. In the discussion program category, Portsmouth will telecast "At Your Service," a 30 minute evening program, Monday through Friday, dealing with health, traffic, school, and other community interests; a 30 minute Sunday program "The People Speak" purporting to cover controversial issues of the day; and a similar 30 minute Saturday program, "Comment On Controversy."

92. The applicants' programs shown above constitute wide samplings for decisional purposes.[20] As previously mentioned, if taken at face value neither applicant's programs show even a modicum of superiority over the other's with the possible exception that Portsmouth's

[19] This finding is made in spite of reasonable doubt cast on the availability of the area on Sundays. However, there is no conclusive evidence that the program cannot be effectuated.

[20] To describe in detail the entertainment programs would be exhaustive and pointless and not productive of additional qualitative factors. Apparently the applicants realized this, since they practically ignored analysis of enter-

agricultural programs may be superior to Beachview's,[21] whereas Beachview's "Miss Ruth Anne's Kindergarten" deserves a token of merit as the only show of production-proved quality in the entire proceeding. Since no overall superiority of programs, per se, is demonstrable from the record, that part of Beachview's point of reliance 5 (fourth paragraph) dealing with "a new and distinctive local program service" and Portsmouth's point II, paragraphs 1, 2, and 3 must fail.

93. Both applicants propose local staffs for news coverage; both applicants allege superior local news services as a consequence. The sub-points of reliance of both parties must fail (Beachview's point 5, paragraph 6, and Portsmouth's point II, paragraph 4). Portsmouth classified as "wire" a considerable amount of news broadcasting which was "live," but interspersed with syndicated material. There is no evidence adduced by Beachview from which it may be inferred that inferior news service will follow; and on the other hand, Portsmouth fails (except with purely conclusional statements) to push its contention in this respect.

94. Two problems remain with respect to programming: first, the question of preparation, including surveys, contacts, work by committees, and kindred activities; second, the question of so-called "program balance." Beachview began preparations for contacts and surveys in September, 1953 and between mid-October and December 24, 1953 had mailed letters regarding programming to over 800 individuals, and civic, social, fraternal, and governmental organizations. Names, dates, nature of contact and other pertinent results were supplied in the McFarland data on December 24, 1953. In this period, Beachview's stockholders made 85 personal contacts in the area. The record indicates that all phases of programs and programming

[21] This observation is made, not so much on the basis of what the program

were included in the survey. The record also indicates that where a specific program, by name or content, was the subject of contact, the crystallization of the program in its final form was the end-product of the contact(s). Prior to the exchange of the McFarland data, Portsmouth had made only 43 contacts with persons other than its own stockholders. Practically all contacts made by Portsmouth were made after the exchange of the McFarland data and after the program proposals were in and the proceeding set for hearing. Of contacts with film suppliers, only 12 of 75 were made before the program proposals were in. Portsmouth has organized a number of "advisory committees" on agriculture, community relations, governmental affairs, education, armed forces, sports, and so on. These committees have had no function in the formulating of the programs here under discussion. Most of them have never met; those which have had a meeting did so after the program proposals were in. Testimony of committee members indicates, and it is found as a fact, that these committees intend to function only if a grant is received. There is no indication in the record that any stockholder or director planned any specific program. Portsmouth did not produce a single witness who was intimately conversant with program content.[22]

95. In tackling the question of "program balance" there must be taken into account the fact that the record herein is devoid of criteria for determining superiority. Program balance is a relative concept—relative to the community to be served. The Norfolk area is predominately con-

[22] In this connection reference is again made to the fact that a former employee was responsible for the program exhibits. Portsmouth's chief program witness, Burkland, was at a serious disadvantage in attempting to testify concerning them. There is no doubt but that Burkland's testimony was honest and was the best he was capable of giving at the time, but it was very often not responsive and frequently consisted in generalizations where specific factual answers should have been at his command. The only conclusion that can be drawn is that he had no recognizable part in the actual construction of the programs.

cerned with U.S. Naval activity, other marine activity (including fishing), shipbuilding, and agriculture—on the business and vocational level. The area is not a typical American area of comparable square miles and population. While it would appear that Portsmouth is a little long on Talks and a little short on Education, no positive finding can be made to that effect. It also appears that Portsmouth has a heavy bunching over the week-end of news reviews and current (political) events such as are contained in "Tidewater Looks At Washington." However, reference is made to the advisory committees of Portsmouth, whose duties appear to be all *in futuro*, and it is also now found as a fact that Beachview has set up an overall advisory committee whose functions, collectively, will be analogous to those of the Portsmouth committees. Beachview's committee has met, but its function will be heightened if the applicant receives a grant. In view of the fact that a reliable concept of "program balance" for an additional television facility in the Norfolk area must await the pragmatic test, and the further fact that the committees or committee of the successful applicant may be presumed to watch the matter for the purpose of making corrective suggestions, no finding of superiority can be made in this proceeding.

96. Beachview asserts a point of reliance on staffing. (No. 6) Careful scrutiny reveals that a variety of basic facts are established, but these facts are not going to be formally found herein for the reason that any conclusions drawn from them would be so inconsequential as to have no decisional weight.

97. Beachview also asserts a point of reliance on equipment other than transmission and associated facilities. (No. 7) Careful scrutiny reveals that a variety of basic facts are established, but these facts are not going to be formally found herein for the reason that any conclusions

drawn from them would be so inconsequential as to have no decisional weight.[23]

98. At the time of the commencement of the hearing proper (January 8, 1954) Portsmouth had operated WAVY-AM between five and six months. Portsmouth was permitted to assert its point of reliance (No. VI relating to ability to rely upon representations) on the basis of that fact. The purpose of acquiring the AM station was its use as a training ground for television both with respect to staff and programming. The death of Portsmouth's president resulted in a reorganization of the applicant and planned changes in the station's operation were delayed. No basic historical facts of even slight consequence tending to support the point of reliance were established by exhibit or testimony. Consequently Portsmouth's point VI must fail.[24]

99. Beachview asserts as a point of reliance that it should be preferred because a grant to Portsmouth would mean that all five channels "allocated to the area involved"[25] would be in the hands of standard broadcast stations (point 9). At the time of the hearing there were 9 AM stations, 3 FM stations, 1 VHF television station, and 3 UHF television stations concentrated in the heart of the area. The television stations were owned by AM licensees. These 16 facilities were distributed among ten licensees. There appears to be no paucity of broadcast facilities in the area. It is difficult to see how violence to

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[23] When the points of reliance were accepted, it was almost impossible to forecast the decisional value of any given point. Caution in the interest of permitting an applicant to have his "day in court" dictated the acceptance of points like Beachview's 6 and 7 which now are seen to be of negligible decisional value. Elementary common sense is convincing that any slight defects in an opponent's proposal discovered in pursuing these points would be corrected before an actual operation was commenced.

[24] Of course, it must not be inferred that the converse of the point is true.

[25] Here, apparently, Beachview goes in the direction of conceding what it would not concede under its "Local Residence" point, namely, that the area may be considered, from the broadcast viewpoint, as a single economic and

the Commission's policies on the diversification in ownership of the media of mass communication would be done by a grant to Portsmouth. Beachview's point must fail.

100. Beachview asserts two points of reliance, 8 and 10, which may be taken together. They deal with the comparative qualifications, from the standpoint of callings and civic connections, of the persons who will participate in the day-to-day operations of the stations. Portsmouth's point 1 is broad enough to touch the same subjects. Commission cases on the subject are so well known as to obviate the necessity of citation. The Commission is appreciative of the fact that the greater the diversification of legitimate activities of those in control of a facility, the more responsive will they be to the community's interests, needs, and problems. The real test then, is not how many surface labels can be tacked on to those in control, but what their actual interests and connections have been. The basic facts for the determination of these points are set forth in the section on the composition of the applicants (p. 2 and ff.). These reveal that the backgrounds of the principals of each applicant are so commendably broad and their civic connections so extended that the value of comparing them to determine superiority vanishes.[26]

101. Beachview asserts as a point of reliance (No. 3) that it is superior to Portsmouth in that its stockholders have had extensive personal experience in actual television broadcasting, whereas only one of Portsmouth's stockholders has had any experience in television. The basic facts bearing upon this point are contained in the section on the composition of the applicants (p. 2 and ff.) wherein pertinent experience is recorded. For Beachview, Guidice has had extensive and successful experience in the production phases of the industry. The mere factual recita-

[26] Deserving only footnote attention are claims by both parties that a principal of the other has permitted illegal conduct in the operation of his affairs. The actions complained of are understandable under the circumstances and would have been only remotely controllable by the principals. The allegations of personal stigma are symbols of respective counsels' zeal rather than their judiciousness.

tion of his background shows his versatility. Mrs. Flaherty, in her sphere, is likewise accomplished. Kipnes's television experience would appear to be slight, and, while the fact that Cooper and others connected with Beachview have made some studies of the industry and visited television stations is indicative of their intelligent interest, it cannot be said these factors add up to actual accomplishment for decisional value. For Portsmouth, Burkland has had only limited experience in television, and the conclusion is inescapable that such television experience as he has had (all with CBS) was not on the practical "know-how" level—the inner workings of production level—but on the fiscal level—the executive sales level. Like some of Beachview's people, some of the Portsmouth people have visited television stations and reflect an intelligent layman's familiarity with the industry, but again, this has no decisional significance. In disposing of this question, it is realized that Beachview's emphasis on stockholders seems to be straining a point when the smallness of Guidice's and Mrs. Flaherty's holdings are compared with the rather substantial holdings of Burkland. On the other hand, it is the qualitative experience rather than the quantitative monetary interest that is the essential factor to be considered. Beachview's point must be considered well taken.

102. From paragraph 67 on; the findings have been subsumed under the heading "Programming" for the reason that, in greater or less degree, their ultimate bearing is on the question of what the station's product for public consumption will be. The only programming finding left to be made is that called for by the residual parts of Beachview's point 5 and Portsmouth's point II C5 and D. The finding must go for Beachview. As indicated in paragraph 98, Portsmouth failed to show facts to support programming correlation between its AM station (the gist of its claim for preference under II C5); and the facts shown (especially in paragraph 94) plainly indicate timelier and more extensive investigation and preparation by Beachview

103. Portsmouth asserts a point (IV on experience in which it is alleged that because the personnel of the AM station have worked together successfully as a unit, they will work together successfully as a unit in television, whereas the Beachview people have not worked together as a unit and can give less assurance of doing so successfully in television.[27] This point does not call for a finding on the quality of the AM product or of its general operation and, factually, little was put in evidence to support the point. The hearing itself, where Burkland and Phelan, especially, were observed as a part of a "team" so to speak, gives credence to the assertion that, at least as applicable to the upper levels of the personnel structure, the point has merit.[28] No further finding on the point is possible from the facts of record.

IV

Conclusions

(Remarks)

104. In the foregoing parts of this decision, basic findings of fact have been made and, where feasible, ultimate findings have been progressively reached and points of reliance disposed of "on the spot." In paragraph 66, consideration of the remaining points of reliance, namely, Beachview's points 2, 11, 16, and 20, were deferred until now because these points are primarily concerned with policy considerations rather than pure description or exposition. Intangibles rather than the hard data of the scenes play a part here. It is to be here remarked that, even though there have been findings of ultimate fact heretofore, all of which are supported by basic facts, those findings up to this point do not establish an unequivocal superiority of the one applicant over the other.

[27] This point also claimed general superiority in television experience. That phase of the contention is covered in paragraph 101, supra.

[28] Of course, this may not be construed as a finding that Beachview will not have a smooth functioning organization.

Neither applicant can be said to be free of decided deficiencies in some respects. It is also noted that, by virtue of the points of reliance practice, a vast array of facts in the record cannot be used for decisional purposes, although they would normally be probative. Speculation on whether the final outcome of the case would be the same if these facts which must be ignored were considered has not been pursued.

105. The action of 50 Portsmouth stockholders owning 37.4% of the stock in turning their stock over to 11 voting trustees successfully placed a barricade between themselves and the corporation. The usual cause and effect relationship between ownership and managership was defeated. Effective interaction between themselves and their company ceased to exist except by the grace of the trustees. To say that the 50 stockholders have confidence in the trustees does not alleviate the seriousness, from a regulatory point of view, of abandoning their interest in the public domain. Ownership of such a chose involves duties as well as rights. Commission approval of the transfer by no means implies Commission approval of intent or consequences. All of the trustees of Portsmouth except one testified at the hearing and the conviction is inescapable that they are men worthy of the highest trust. Their stature in the area is indisputable. It is likewise apparent that they would do a good job in the management of the station. These excellent factors must suffer, however, before the adverse implications, as a matter of principle, of a numerical majority of practically 5 to 1, holding 62.71% of the total stock, deserting their rights and duties to a well-nigh irrevocable trust.[29]

106. Beachview's point 20 contains a statement of fact, undisputed, which is in evidence. It is the fact that at a joint meeting of the directors and stockholders (with all

[29] Since the Commission held that its approval was necessary for the transfer of control to the trustees, it follows that its approval is necessary to terminate it, since control would again shift.

the latter voting by proxy) of Portsmouth on November 11, 1953, the following action was taken:

> "The minutes of all previous meetings of the Board of Directors Executive Committee and Stockholders were read and fully discussed. It appeared from the discussion that certain actions taken by the Executive Committee and Board of Directors should have been approved or taken by the stockholders. Thereupon, upon motion duly made and seconded, and by the affirmative vote of all present, it was:
>
> "RESOLVED, That except where explicitly changed or amended by the Stockholders, all actions heretofore taken by the Board of Directors which should have been taken by the Stockholders are hereby ratified, affirmed and approved and made binding on all of the Stockholders, and all actions taken by the Executive Committee which should have been taken, ratified or approved by the Stockholders are hereby ratified, affirmed and approved by the Directors, all of such actions as fully as if herein completely again re-enacted and set out."

This point of reliance is asserted to indicate that the stockholders will not participate prospectively in the affairs of the company. Regardless of the actual intent of the above resolution, its practical effect would be to "clean the slate" for the voting trust agreement which with finality precludes any prospective participation in the affairs of the corporation by stockholders other than those who are voting trustees.

107. The 50 stockholders are substantial owners of Portsmouth, but the record shows that only a half dozen will participate in management (and these only in slight to moderate degree). The facts as shown in the section on the composition of the applicants (p. 2 and ff.) shows that numerically and stockwise, Beachview's stockholders will participate to a greater degree in the management of the company than will the stockholders of Portsmouth.

108. As noted in the basic findings (paragraphs 33 and 34, supra) it is possible for the eleven voting trustees to gain control of Portsmouth under certain circumstances which they can control.

V

Conclusions
(Final)

1. Neither applicant is to be preferred over the other except on the basis of the conclusions reached in the Remarks, paragraphs 104, 105, 106, 107, and 108, supra.

2. The abandonment of their rights and duties by 50 Portsmouth stockholders to 11 voting trustees is contrary to the public interest.

3. The integration of ownership and management is more pronounced in the case of Beachview than in the case of Portsmouth.

4. On the basis of conclusions 1, 2, and 3, supra, Beachview should be preferred over Portsmouth.

5. It is Accordingly Ordered, this 23rd day of December, 1954 that the application of Beachview Broadcasting Corporation for a construction permit to build a new commercial television station using Channel 10 in the Norfolk, Virginia area Be Granted, and the application of Portsmouth Radio Corporation for the same facility Be Denied.

Federal Communications Commission

Charles J. Frederick
Charles J. Frederick
Hearing Examiner

Released: December 29, 1954

Effective 40 days thereafter subject to Section 1.853 of the Commission's Rules

* * * * * * * * * * *

Order Governing Course of Proceeding

On January 4, 1954, a pre-hearing conference in the above-entitled matter was held, followed by hearing conferences pursuant to Section 1.841 of the Commission's Rules on January 8, 12, 13, 14, and 29. Detailed exposition of the discussions occurring at these conferences is not necessary in this Order.

Incorporated by reference herein is a joint memorandum of counsel dated January 20, 1954 which appears on pages 179, 180, and 181 of the transcript for January 29 and is clearly identifiable therein without further description here. This joint memorandum expresses the present status of agreement between applicants' counsel with respect to stipulations, depositions, and admissions and has the concurrence of Commission counsel. In addition, all counsel agreed "that until the Commission adds issues with respect to finances, neither party will offer any census or economic data as to the area in question." (Tr. p. 182)

From a variety of matters of reliance submitted by applicants' counsel, the Examiner has found the following acceptable:

BEACHVIEW BROADCASTING CORPORATION

1. Local Residence

Six of the 8 stockholders of Beachview B/C representing 98.91% of its stock are residents of Norfolk proper or (in the case of one 10.03% stockholder) have been residents of Norfolk. The remaining two stockholders (representing 1.09% of the corporate stock) are television specialists, who have resided in the Washington, D. C. area.

In considering the local residence consideration vis-a-vis Portsmouth Radio Corporation, (referred to hereinafter as Portsmouth R C), it must be borne in mind that, through a Voting Trust Agreement, its 61

stockholders have divested themselves of all effective control over the operation of the station proposed. It is proper, therefore, to look to the 11 voting trustees insofar as any relevant consideration of residence address may be concerned. Additionally, it is pertinent to point out that Portsmouth R/C proposes to locate its studios in Portsmouth. Of the 11 voting trustees, only one, Carl J. Burkland, is identified as a resident of Portsmouth, and he, obviously, is a newcomer to the area having apparently been brought to Portsmouth in July of 1953 by the applicant. The remaining 10 voting trustees, while apparently residing in the Tidewater Area, are not identified as residents of the city of Portsmouth. Of the 61 stockholders of Portsmouth R/C, 5 are indicated to reside in Portsmouth.

2. Integration Of Ownership And Operation (Management)

All stockholders of Beachview B/C will participate in the actual day-to-day operations of the station proposed in well-defined capacities. (Related to a 40-hour week), the 8 stockholders pledge themselves to devote, as a minimum, the following percentages of their time to the day-to-day operations of the station: Dudley Cooper, 100%; Irvin M. Kipnes, 100%; Francis V. Guidice, 100%; Ruth Anne Flaherty, 100%; Paul O. Hifschbiel, 60%; Vernon T. Myers, 60%; John R. Roughton, 60%; Dr. W. Gerald Akers, 25%. (Average related to number of individuals, 75%. Only 8 percent of the stock of Beachview B/C is identified in the time *not* integrated in day-to-day operations).

In the case of Portsmouth, R/C, only 17 of its 61 stockholders appear to be integrated in the day-to-day operation of the station and several of these, merely in advisory capacities. Of the 11 voting trustees, it

is indicated that time will be devoted to the station (again on a 40-hour week basis) as follows: Hunter C. Phelan, 100%; Carl J. Burkland, 100%; Henry Clay Hofheimer, II, 37½ to 50%; J. C. Aspinwall, Jr., 50%; Richard D. Cooke, 37½; E. T. Gresham, 50%; Porter Hardy, 50%; William M. Camp, 50%; Joseph W. Later, 37½ to 50%; George T. McLean, 50%; C. K. Hutchens, 37½. (Average, related to number of individuals, 54%; related to stock holdings, 20%; over 80 percent of the stock of Portsmouth R C is identified in the time *not* integrated in day-to-day operations).

Additionally, Beachview B C asserts that it will be in a position to show that the Voting Trustees of Portsmouth R C cannot reasonably be expected to devote to the day-to-day operation of the station the time proposed. Porter Hardy, for example, a member of the United States Congress, has indicated that he will devote 20 hours weekly to the operation of the station.

3. Experience In Television Broadcasting

Two of the stockholders of Beachview B C, each of whom will devote 100 percent of his time to the station, have had extensive personal experience in actual television broadcasting—one as a producer of television shows, Francis V. Guidice; the other, in the production of children's programs for television, Ruth Anne Flaherty. Another stockholder, Irvin M. Kipnes, who likewise will devote 100 percent of his time to the station, has also had experience in arranging and producing television shows. Dudley Cooper, who will devote in-excess-of 40 hours weekly to the station, has pursued and graduated from a formal course of instruction in television, and has devoted a great deal of his time to visiting various television stations for

the purpose of studying and observing actual television operations. Additionally, all of the remaining stockholders have each visited at least 6 television stations for the purpose of studying and observing actual operations.

In the case of Portsmouth R/C, it appears that only one of its stockholders has had any experience in television; and even that is questionable.

4. Independent Operation

Beachview B/C proposes a genuinely independent television operation, geared to the particular needs of Norfolk and the Tidewater Area. Portsmouth R/C proposes a network operation, if it can secure a network. Failing this, it proposes to operate as an independent.

5. Local Programming

Beachview B/C proposes that 59.21 percent of its total telecast time will be local live; Portsmouth R/C proposes that 36.11 percent of its total telecast time will be local live.

Beachview B/C has negotiated through personal contacts for each program to be produced locally and has made the necessary contacts for its feature film and film programs. It asserts, on the basis of inquiry, information and belief that Portsmouth R/C has not so developed its local programs.

Beachview B/C has made a more comprehensive and effective survey to ascertain local program needs and the availability of talent and local sources of programming than has Portsmouth R/C.

Beachview B/C proposes to bring to the Tidewater Area a new and distinctive local program service. Portsmouth R/C proposes some local programs but

essentially merely to bring the programs of a network already being received in the area.

The local programs of Beachview B/C are more fully planned and developed than are the local programs of Portsmouth R/C.

Beachview B/C proposes newscasts of local origin, developed through facilities maintained by its proposed station. Portsmouth R/C reflects the source of all its newscasts to be "wire".

Relating the foregoing considerations to the actual programs proposed (particularly in the light of other areas of superiority), the quality of the program service of Beachview Broadcasting Corporation will be superior to that of Portsmouth Radio Corporation.

The programs of Beachview Broadcasting Corporation are characterized by better balance:

A. The program percentage proposals of Beachview Broadcasting Corporation reflect 8.16% educational; Portsmouth Radio Corporation, only 3.7% educational.

B. Between the hours of 6:00 P.M. and 11:00 P.M., Beachview proposes 69.28% commercial and 30.72% sustaining time; between the same hours, Portsmouth proposes 80.71% commercial, 19.29% sustaining.

C. In the same time segment indicated in "B", above, Beachview proposes 62.14% live programming; Portsmouth, only 23.57% live.

6. Staff

Beachview B/C proposes a staff of 130 employees for the presentation of its proposed programs—95 hours weekly. The size of the staff and the allocation of personnel were carefully developed and deemed

necessary to the effective presentation of the programs scheduled. Portsmouth R C proposes a staff of only 86 employees to present 118-1 6 hours of programming weekly (assuming a network operation) and 108-1 6 hours weekly (assuming an independent operation). Portsmouth R C, for example, shows no cameramen on duty after 8:30 P.M. on Sundays, despite the fact that it proposes to program until 12:30 A.M., Monday.

Beachview B/C has developed its staff in order to provide for ample rehearsal time for local live programs and has developed its plans for allocation of staff personnel in precise detail with respect to each program proposed. Portsmouth R/C does not show the availability of personnel for rehearsal of local, live programs; nor does it show the availability of personnel to handle mike boom, lighting and other "floor" duty assignments; nor does it show the assignment of personnel to specific programs.

The staff of Beachview B/C from the standpoint of experience will be superior to that of Portsmouth R/C.

Beachview Broadcasting Corporation has made provision for needed personnel asignments, including an Educational Director, which have not been provided for by Portsmouth Radio Corporation.

7. Equipment (Other Than Transmission And Associated Facilities)

Beachview B/C proposes to utilize five cameras. Portsmouth R C proposes four cameras. Illustrative of the inadequacy of the Portsmouth R/C proposal, related to its program schedule, are such problems as the following:

1. Portsmouth R C proposes to telecast two remote programs "back-to-back" on Sundays. With the norm of two cameras for each program, Ports-

mouth R/C will have no cameras available to produce any of the local programs, before or after, the remote.

2. Portsmouth R/C proposes to televise a 2¼ hour sports contest every Saturday. Utilizing two cameras, as a minimum therefor, only two cameras are available for the local, live programs before and after the remote, which it is submitted, are inadequate for the programs proposed.

Beachview B/C proposes two film-camera chains. Portsmouth R/C proposes only one film-camera chain, creating a possibility that, during film programs, the station may be forced off the air by reason of mechanical difficulties.

The equipment proposal of Beachview provides in meticulous detail for the equipment requirements for each program; whereas, the equipment proposal of Portsmouth is inadequate properly to implement its program proposals, as illustrated above.

8. Management And Operation

The backgrounds of the stockholders of Beachview B/C who will participate in the actual day-to-day operations of the proposed station are more varied and better designed to insure an effective television operation in the public interest, including experience in the following: professions (3); business (3); banking (1); entertainment—radio and television (3); civic amusement centers (1); reporting—newspaper and magazine (1); social work (2).

By contrast (bearing in mind that all responsibility for management has been placed by Portsmouth R/C in 11 voting trustees), backgrounds in the case of Portsmouth R/C are: professions (1); entertainment-radio (1); business (9); farmer-politician (1); politics (3).

9. Dual Ownership of Radio and Television Stations in the Same Community

Channel 10, the channel being sought in this proceeding, is the only remaining commercial channel of the five allocated to the area involved. The other four channels (stations now on the air) are owned and operated by licensees who also own and operate broadcast stations as follows:

Television Station	AM Station
WTAR-TV (Channel 4)	WTAR, Norfolk, Va.
WTOV-TV (Channel 27)	WLOW, Portsmouth, Va.
WVEC-TV (Channel 15)	WVEC, Hampton, Va.
WACH-TV (Channel 33)	WHYU, Newport News, Va.

Portsmouth R/C is the licensee of standard broadcast station WAVY, Portsmouth, Virginia. A grant of its application would mean that all five television channels are in the hands of standard broadcast stations.

Beachview B/C, on the other hand, is not the licensee of any radio facility nor does it otherwise have a medium of mass communication. It is submitted that the implications of a grant to Portsmouth R/C, as indicated above, constitute a significant difference between the applicants favoring Beachview B/C.

10. Civic Connections

Five of the eight stockholders of Beachview B/C have resided in the city of Norfolk for a total of 190 years where they have had extensive civic connections and activities (See McFarland Letter Attachment data).

Only one of the voting trustees of Portsmouth R/C is stated to reside in Portsmouth, he having lived there for some 6 month. (Id.)

11. The Stockholders of Portsmouth Radio Corporation, Essentially Regard the Proposed Station as a Business Investment

Through a Voting Trust Agreement, 50 of the 61 stockholders of Portsmouth R/C have divested themselves of all effective legal rights normally implicit in the ownership of corporate stock; including the right to participate in the election of directors, in the overall policy decisions vis-a-vis management, and, of course, the elementary right to vote their stock. Manifestly, these 50 individuals regard the proposed television station as merely another business investment. Indeed, were Portsmouth R/C the only party to this proceeding, such an extensive divestment of responsibilities on the part of stockholders in a would-be television licensee is questionably in the public interest.

Beachview B/C, on the other hand, clearly believes that stockholders should have the fullest possible participation in actual station operation, and its corporate minutes reflect an agreement whereby there will be a greater and more effective participation by a majority of the stockholders than the actual voting rights obtaining under their stock would indicate.

Additional Matters Advanced by Beachview Relating to the Character and Background of the Corporate Applicant, Portsmouth Radio Corporation and the Individuals Associated Therewith:[1]

12. The fact that Portsmouth Radio Corporation has failed to disclose material information required by the Commission and has supplied erroneous information to the Commission reflects adversely upon the

[1] Beachview's matters of reliance nos. 12 to 16, inclusive, are but briefly set forth in this Order. The rationale of this step is evident in the discussions commencing on line 5, page 161, and continuing through line 9, page 168 of the transcript of the hearing conference for January 29.

character and background of the corporate applicant and the individuals associated therewith.

13. The fact that Portsmouth Radio Corporation has made a proposal containing violations of Commission rules reflects adversely upon the character and background of the corporate applicant and the individuals associated therewith.

14. The fact that Portsmouth Radio Corporation has made a material misrepresentation of fact to the Commission reflects adversely upon the character and background of this corporate applicant and the individuals associated therewith.

15. The fact that Portsmouth Radio Corporation has supplied information and statements of fact mutually conflicting reflects adversely upon the character and background of the corporate applicant and the individuals associated therewith.

16. The fact that the corporate structure and organization of Portsmouth Radio Corporation is designed to permit some eleven persons designated as voting trustees to obtain control over the class A and class B stock of the corporation upon a negligible financial outlay at the expense of some fifty other stockholders raises a question concerning the character of the applicant and the parties associated therewith.

PORTSMOUTH RADIO CORPORATION

1. *Local Residence*

In making the Channel 10 allocation, the Commission recognized that Norfolk is but the central city of a larger unit, the principal cities of which are Norfolk, Portsmouth and Newport News. However, there are also many other communities within the service area of Channel 10, such as Franklin, Suffolk, Windsor, Smithfield, Warwick, Williamsburg, etc. All of these

communities are separate corporate entities and have their own individual problems and needs.

The stockholders of WAVY are the leading citizens not only of Norfolk but also of the many other communities that are in the service area of the station. The 61 WAVY stockholders reside in the following Tidewater communities: Norfolk, 27; Portsmouth, 6; Newport News, 2; Franklin, 5; Churchland, 2; Smithfield, 5; Virginia Beach, 5; London Bridge, 2; Williamsburg 2; Suffolk, 2; Windsor, 1; Princess Anne, 1; Warwick, 1.

The residences of the eleven trustees are distributed as follows: Norfolk, 4; Portsmouth, 2; Franklin, 1; Churchland, 1; Newport News, 1; Smithfield, 1; Virginia Beach, 1.

Moreover, with one exception—Mr. Burkland—the WAVY stockholders and trustees have resided in their present communities for many years and many of them have lived there all of their lives. All of them have had extensive participation in the business, civic and cultural life of their communities which have made them the leading citizens of their communities.

In the case of Beachview's eight stockholders, two of them—Francis V. Guidice and Ruth Anne Flaherty—are non-residents of the Tidewater area and have never lived there. Another one—Irvin M. Kipnes—has only recently moved to the area. The other five are residents of Norfolk. None of the other communities in the service area of the station has representation in the stockholders of Beachview. Moreover, the participation of Beachview stockholders in civic affairs is very meager compared to that of the WAVY stockholders.

II. *Programs*

WAVY is to be preferred to Beachview on the basis of program proposals for the following reasons:

A., B.—(Rejected by Examiner)

C. WAVY's local programs are superior to those of Beachview. Illustrations of this superiority are:

1. WAVY proposes a distinctive series of agricultural programs which are specifically designed to meet the agricultural needs of the area served by the station. Beachview's agricultural programs are not of the same distinctive quality.

2. WAVY proposes a distinctive series of marine and weather reports which are specifically designed to meet the shipping needs of the area served by the station. Beachview did not propose programs of a distinctive character relating to marine and weather reports.

3. WAVY proposes a distinctive series of programs relating to the needs of the armed services personnel in the area served by the station. Beachview did not propose a distinctive series of programs relating to the needs of the armed services personnel in the area.

4. WAVY proposes more extensive news coverage of a local nature than does Beachview. The news programs of WAVY are classified as wire because each news program will involve use of some syndicated material.

5. WAVY's ability to produce its local programs is based upon extensive contacts with local sources and upon its experience in presenting programs of a similar nature on its AM station.

D. WAVY's local programs are based upon much more extensive study of local needs and upon more extensive contacts with educational, religious and public leaders throughout the service area than in the case

III. *Studio*—(Rejected by Examiner)

IV. *Experience*

WAVY personnel have had experience in responsible jobs in connection with radio and television operations. Moreover, the staff of WAVY which will be utilized in the television operation have had an opportunity to work together as a unit under the supervision of the officers who will run the television station and their success in that regard holds promise that they will also be successful in their operation of the television station. The personnel of Beachview have never worked together as a unit and there is less assurance that they will be able to do so successfully than in the case of WAVY.

V. *Corporate Set-Up*

WAVY's corporate set-up permits action by stockholders to be taken by majority vote. In the case of Beachview, an 85% vote is required for stockholder action, including election of directors. There is thus greater assurance that commitments made by WAVY can be carried out than in the case of Beachview where a small minority can prevent stockholder action.

VI. *Ability To Rely Upon Representations*

The Commission can have greater confidence in the ability of WAVY to carry out its commitments than in the case of Beachview because:

A. WAVY has operated an AM station in the Tidewater area since July 1953 and its record of operation and developing local programs, cooperating with nonprofit organizations in the area and cooperating with the armed services in the presentation of programs demonstrates that it is able to serve the needs of the area. Beachview has no such record.

B. (Action on VI-B deferred at request of counsel until the Commission rules on WAVY's Petition to Enlarge the Issues, filed January 7, 1954.)[2]

All parties to this proceeding shall be bound with respect to the foregoing matters of reliance except insofar as they may be modified or added to as a result of: (a) appeal to the Commission; (b) request addressed to the Examiner; (c) action upon pending petitions.

Based upon the foregoing and all pertinent data of record,

IT IS ACCORDINGLY ORDERED, This 4th day of February, 1954, as follows:

1. That exhibits shall be exchanged by the parties and copies presented to Commission counsel on February 15, 1954, and

2. That this instrument together with items incorporated herein by reference and the terms under which they were incorporated shall govern the subsequent course of this proceeding, unless the course shall be modified in accordance with applicable procedure.

FEDERAL COMMUNICATIONS COMMISSION
Charles J. Frederick, Hearing Examiner

WM. P. MASSING
Wm. P. Massing
Acting Secretary

[2] In view of the fact that there now appears to be no contention over the acceptability of Beachview's matters of reliance, the Examiner has taken the liberty of renumbering them consecutively herein without showing the original numbering of those rejected. In the case of Portsmouth, where counsel has indicated exceptions to the Examiner's rulings, the original numbering has been retained to preserve accurate reference. Since drafts of the original matters of reliance of both parties are elsewhere in the record and are easily available, it would serve no useful purpose to spell out in this Order the matters rejected.

Supplemental Order Governing Course of Proceeding

On February 5, 1954 the following matters of reliance were submitted to the Examiner, in the presence of all parties, by Beachview Broadcasting Corporation:

26. *The fact that officials and stockholders of Tidewater Telecasting Corporation were elected directors of Portsmouth on November 11, 1953, and subscribed to stock in Portsmouth prior to November 16, 1953, reflects adversely upon the character and background of Portsmouth as an applicant and upon individuals associated therewith; inasmuch as the application of Tidewater was not dismissed by the Commission until November 19, 1953.*

Minutes of a joint meeting of directors and stockholders of Portsmouth on November 11, 1953, reflect that at the said meeting J. C. Aspinwall, Jr., E. T. Gresham, and R. D. Cooke were elected directors of Portsmouth. At the same time and for over a week thereafter, these three men were shown as officers and/or directors and stockholders of Tidewater Telecasting Corporation in a pending application before the Commission for the very same facility being sought by Portsmouth. Eight persons, formerly stockholders in Tidewater, subscribed to stock in Portsmouth, while the application of Tidewater was still pending before the Commission.

27. *The fact that J. C. Aspinwall, Jr., E. T. Gresham, and R. D. Cooke on November 16, 1953 voted and were permitted to vote as directors of Portsmouth on a motion to pay the sum of $7,750.00 to Tidewater Telecasting Corporation and, upon a stated contingency, an additional $2,500.00 to Tidewater reflects adversely upon the character and background of Portsmouth as an applicant and upon individuals associated therewith, inasmuch as the named individuals were at that time*

officially associated with Tidewater in a pending application for the same facility being sought by Portsmouth.

The minutes of a Portsmouth Board of Director's meeting on November 16, 1953, reflects that J. D. Aspinwall, Jr., E. T. Gresham, and R. D. Cooke voted affirmatively on the following resolution:

"(b) RESOLVED, That Portsmouth Radio Corporation reimburse Tidewater Telecasting Corporation for its out-of-pocket expenses in prosecuting its application but not in excess of Seven Thousand Seven Hundred and Fifty ($7,750.00) Dollars, unless and until Portsmouth Radio Corporation receives a construction permit for a VHF television channel in which event Tidewater Telecasting Corporation is to be reimbursed an additional Two Thousand Five Hundred ($2,500.00) Dollars for out-of-pocket expenses of Louis Peterson in connection with the prosecution of the application. The reimbursement is to be in return for the dismissal of the Tidewater Telecasting application and an undertaking by its stockholders not to participate in any application which is in competition with that of Portsmouth Radio Corporation."

At the time they so voted they were officially associated with a pending application before the Commission for the same facility being sought by Portsmouth.

28. *The fact that Portsmouth, in paying Chesapeake Service, Inc., and Tidewater Telecasting Corporation to dismiss their applications, required that all persons associated with those applications refrain from becoming associated with any applicant competing with Portsmouth reflects adversely upon the character and background of Portsmouth as an applicant and upon individuals associated therewith, as does the incurring of a contingent liability to pay Tidewater an addi-*

tional sum of money conditioned upon Portsmouth's receiving a grant.

The minutes of the November 16, 1953, meeting of Portsmouth's Board of Directors reflects the following resolutions:

"(a) RESOLVED, That Chesapeake Services, Inc. be reimbursed for its out-of-pocket expenses in prosecuting its television application but not to exceed Eight Thousand One Hundred ($8,100.00) Dollars—in return for dismissal by that corporation of its application and an agreement that its stockholders will not participate in any application which is in competition with that of Portsmouth Radio Corporation."

"(b) RESOLVED, That Portsmouth Radio Corporation reimburse Tidewater Telecasting Corporation for its out-of-pocket expenses in prosecuting its application but not in excess of Seven Thousand Seven Hundred and Fifty ($7,750.00) Dollars, unless and until Portsmouth Radio Corporation receives a construction permit for a VHF television channel in which event Tidewater Telecasting Corporation is to be reimbursed an additional Two Thousand Five Hundred ($2,500.00) Dollars for out-of-pocket expenses of Louis Peterson in connection with the prosecution of the application. The reimbursement is to be in return for the dismissal of the Tidewater Telecasting application and an undertaking by its stockholders not to participate in any application which is in competition with that of Portsmouth Radio Corporation."

The undertaking to restrain the further participation of persons associated with Chesapeake Services, Inc., and Tidewater Telecasting Corporation in any application seeking Channel 10 at Norfolk, the only re-

maining uncommitted commercial channel, and the incurring of a contingent liability conditioned upon receipt of a grant by Portsmouth are contrary to the public interest.

29. *The affairs of Portsmouth have been conducted in such manner as to indicate that the stockholders will not actively participate prospectively in decisions affecting programming, operation, and related matters.*

Illustrative of the foregoing is the fact that the minutes of a joint meeting of the directors and stockholders (with all the latter voting by proxy) of Portsmouth on November 11, 1953, reflects the following (Item 11):

> "The minutes of all previous meetings of the Board of Directors Executive Committee and Stockholders were read and fully discussed. It appeared from the discussion that certain actions taken by the Executive Committee and Board of Directors should have been approved or taken by the stockholders. Thereupon, upon motion duly made and seconded, and by the affirmative vote of all present, it was:
>
> "RESOLVED, That except where explicitly changed or amended by the Stockholders, all actions heretofore taken by the Board of Directors which should have been taken by the Stockholders are hereby ratified, affirmed and approved and made binding on all of the Stockholders, and all actions taken by the Executive Committee which should have been taken, ratified or approved by the Stockholders are hereby ratified, affirmed and approved by the Directors, all of such actions as fully as if herein completely again re-enacted and set out."

Counsel for Portsmouth Radio Corporation interposed no objection to the addition of these matters to those of

Beachview Broadcasting Corporation heretofore accepted by the Examiner.[1] Commission counsel objected to nos. 26, 27, and 29. The Examiner found the above matters to be acceptable.

It Is Accordingly Ordered, This 5th day of February, 1954, that the above matters of reliance numbered 26, 27, 28, and 29 be renumbered 17, 18, 19, and 20 to conform to the numbering scheme adopted heretofore by the Examiner and, as so numbered, be added to the matters of reliance of Beachview Broadcasting Corporation 1-16 inclusive.

Federal Communications Commission
Charles J. Frederick, Hearing Examiner

Wm. P. Massing
Wm. P. Massing
Acting Secretary

[1] Reference is made to the Examiner's *Order Governing Course of Proceeding* in this matter dated February 4, 1954.

Order Adding Points of Reliance

It Is Hereby Ordered this 24th day of March, 1954 that the following points of reliance be added to those of Beachview Broadcasting Corporation:

24. The fact that Portsmouth Radio Corporation on January 26, 1954, issued 8,107 shares of Class B stock, thereby effecting a transfer of control of that corporation without prior Commission consent as required by Section 310(b) of the Communications Act and without complying with Commission Rules and Regulations relating to the matter of transfers of control, reflects adversely upon the character and background of Portsmouth as an applicant and upon individuals associated therewith.

22. The fact that John C. Aspinwall, Jr., stockholder, director and proposed voting trustee of Portsmouth Radio Corporation, failed to disclose while associated with Tidewater Telecasting Corporation, in the application filed by the latter corporation (BPCT-1601) with the Federal Communications Commission (the same having been executed by Mr. Aspinwall as President of the corporation on October 27, 1952) that he was holding stock on behalf of his father and brother reflects adversely upon the character and background of the said John C. Aspinwall, Jr. as well as upon the character and background of his father, John C. Aspinwall, Sr.; and his brother, M. F. Aspinwall, both of whom are also stockholders of Portsmouth Radio Corporation.

FEDERAL COMMUNICATIONS COMMISSION, Charles J. Frederick, Hearing Examiner.

MARY JANE MORRIS
Mary Jane Morris
Secretary

DECISION

By the Commission: Commissioners McConnaughey, chairman and Webster dissenting and voting for Beachview; Commissioner Lee not participating; Commissioner Mack abstaining from voting.

PRELIMINARY STATEMENT

1. In this proceeding, Beachview Broadcasting Corporation (hereinafter called Beachview) and Portsmouth Radio Corporation (hereinafter called Portsmouth) seek a permit to construct a new commercial television broadcast station to operate on Channel 10 in the cities of Norfolk and Portsmouth, Virginia, respectively. Their applications were designated for hearing in a consolidated proceeding by Commission Order of December 9, 1953, together with the [illegible] application of Hampton Roads Broadcasting

Corporation which sought a permit to construct a new commercial television station to operate on Channel 10 in the city of Newport News, Virginia. Under the Commission's Table of Assignments of Television Channels, combination assignments were made to the cities of Norfolk, Portsmouth and Newport News.

2. In the order of designation, Beachview was found to be legally and financially qualified to construct, own and operate a television broadcast station and technically qualified except as to whether the station proposed in its application would constitute a hazard to air navigation. Portsmouth was found to be legally, technically and financially qualified to own and operate a television station. It was found that the said applications were mutually exclusive and therefore a hearing pursuant to the requirements of Section 309(b) of the Communications Act of 1934, as amended, was mandatory to determine on a comparative basis which applicant would better serve the public interest, convenience and necessity. In addition to issues relative to the legal, technical and financial qualifications of Hampton Roads Broadcasting Corporation and an issue as to whether the station proposed by Beachview would constitute a hazard to air navigation, the order of designation set forth the following issue:

> To determine on a comparative basis which of the operations proposed in the above-entitled applications would best serve the public interest, convenience or necessity in the light of the record made with respect to the significant differences among the applications as to:
>
> (a) The background and experience of each of the above-named applicants having a bearing on its ability to own and operate the proposed television station.
>
> (b) The proposals of each of the above-named applicants with respect to the management and operation of the proposed station.
>
> (c) The programming service proposed in each of the above-entitled applications.

3. By order of January 6, 1954, the petition of Hampton Roads Broadcasting Corporation requesting dismissal of its application without prejudice was granted and by order of March 26, 1954, the petition of Beachview Broadcasting Corporation for deletion of the issue relative to whether the station proposed by it would constitute a hazard to air navigation was granted. Therefore, the only issue remaining in this proceeding is as set forth above.

4. The record was opened on January 8, 1954 with a hearing conference pursuant to the provisions of Section 1.841 of the Commission's Rules Relating to Practice and Procedure. Subsequent conferences were held on the dates of January 12, 13, 14 and 29, 1954. The Examiner, on February 4, 1954 issued the first order governing the conduct of the hearing and thereafter amended this order by orders issued on February 5 and March 24, 1954. In these orders the Examiner specified the points of significant difference between the two applicants raised by the parties. Copies of these orders are attached hereto as Appendix A.

5. The record was closed on April 27, 1954 and on May 17, 1954 proposed findings of fact and conclusions of law were filed by each of the applicants and by the Chief of the Commission's Broadcast Bureau. On May 26, 1954 Beachview Broadcasting Corporation filed a pleading termed "Motion to Strike Defamatory and Unwarranted Material From the Findings of Fact and Conclusions of Law Filed by Portsmouth Radio Corporation" to which an opposition was filed on June 2, 1954 by Portsmouth. No formal action was taken on this pleading prior to issuance of the Initial Decision, which, in effect, constituted a denial thereof. Beachview Broadcasting Corporation does not again raise this matter in its exceptions before the Commission, making its further consideration unnecessary.

6. On December 29, 1954, the Examiner released his Initial Decision looking toward grant of the application of

Beachview and denial of the application of Portsmouth. The applicants and the Chief of the Commission's Broadcast Bureau filed exceptions to the Initial Decision and briefs in support thereof. Beachview and Portsmouth filed reply briefs to the exceptions. All parties participated in oral argument on the exceptions before the Commission *en banc* on May 2, 1955. We have considered the disputed rulings of the Examiner and herewith approve them. We have examined each of the parties' exceptions and the reply briefs. Those exceptions that have been granted, either in whole or in part, are reflected in the following opinion; the others, or the portions not so granted, are denied either for reasons set out in the decision, or as contrary to the record, or as adequately reflected by the decision, or as repetitious, or as having no decisional significance here.

The Applicants

Beachview Broadcasting Corporation

7. Beachview Broadcasting Corporation is a Virginia Corporation authorized to issue 1000 shares of no par voting stock. Of the authorized stock 156 shares have been issued and are outstanding and 588 shares have been subscribed.[1] The officers, directors and stockholders are as follows:

Name	Office	Stock Interest		
		Shares		
		Issued	Subscribed	Percent
Dudley Cooper	President and Director	74	500	77.77
Irvin M. Kipnes	Secretary and Director	74		10.03
Vernon T. Myers	Vice-Pres. and Director		20	2.71
Paul O. Hirschbiel	Treasurer and Director		10	1.36
W. Gerald Akers	Vice-Pres. and Director	2		.27
John R. Roughton	Vice-Pres. and Director		50	6.77
Francis V. Guidice	Director		5	.67
Ruth Anne Flaherty	Director		3	.42

[1] By resolution reflected in the corporate minutes for October 3, 1953 it was agreed that voting control of the corporation should constitute not less than 85% of the outstanding stock. Action by the Board of Directors is by majority vote.

8. *Dudley Cooper*, president, director and general manager was born in North Carolina in 1899 and has resided in Norfolk for approximately 53 years. He received his secondary education in Norfolk, then studied optometry in New York. He is a veteran of World War I. In 1920 he commenced the practice of optometry in the Norfolk area. Mr. Cooper and his brothers later went into the retail jewelry business under the name, Cooper's Inc. and now operate three stores in Norfolk and Portsmouth. In 1935 his retail optometric practice was merged with Cooper's Inc. of which he is president and 40% stockholder. He is also president and 40% stockholder of Tidewater Optical Company, Inc., an optical processing laboratory. In December of 1943, Mr. Cooper and his family purchased Ocean View Amusement Park which at that time was in disrepair. The physical facilities of the park were rehabilitated and it became a major attraction during the war years for service personnel, war workers and other Norfolk area people. In 1944, as one of two trustees under a trust created by his wife for the benefit of their children, he purchased Ocean Park Beach, a tract of land with two buildings formerly used as a restaurant and dance hall, for the purpose of aiding the United Service Organization. After constructing and equipping additional facilities, Mr. Cooper staffed it with USO personnel from the group of which he was chairman and the facilities were given over (rent free) to the Naval Hospital and Fort Story Hospital during daytime hours for the use of convalescents. During nighttime hours it was used by the USO for the benefit of servicemen generally. This park was sold by the trustees in February of 1949 to one W. E. Sams. From the record it cannot be determined whether the park was used during this entire period as a USO facility, Mr. Cooper stating at page 736 of the record that it was used during the entire time as a USO facility, but subsequently testifying that there was an interim period when the property was leased to one tenant and then again at a later time when it was leased to another

tenant and was known as D and D Beach. (R. 737, 738). In 1944 he acquired Seaside Park at Virginia Beach[2], subsequently improving and adding to its facilities which were in disrepair. The Princess Anne County Fair is held annually at this park, the proceeds being contributed to community welfare. For this event, the park facilities are kept open and the working crew made available without charge. On a sublease basis, he has also participated in the operation of Seaview Beach Park, a Negro amusement park, for approximately eight years. Mr. Cooper has engaged in a wide variety of activities for the betterment of his community. In addition to his work with the USO he was instrumental in securing improvement of the Norfolk public transit system, is finance chairman of the local Chamber Music Group, formerly Virginia State Chairman of the United Jewish Appeal, presently a member of the Executive, Budget, and Building Committees of the Child and Family Service, Inc. organization and a member of the American Legion, Jewish War Veterans, YMCA, Jewish Community Council, American Joint Distribution Committee, National Conference of Christians and Jews, B'nai Brith, Norfolk and Ocean View Chambers of Commerce, Ocean View Business Men's Association, Norfolk General Hospital Building Fund, National Showmen's Association, Society for the Prevention of Cruelty to Animals and Knights of Pythias. Mr. Cooper has also made extensive personal contributions to local hospitals, churches, museums and other organizations, in addition to making the facilities of the amusement parks in which he is interested available without charge to various United States Naval and local organizations. Among his business interests, Mr. Cooper holds a one-eighth interest in Tanhem Company, Inc., which was organized after the death of his father to avoid disposing of certain rental properties inherited by

[2] The record does not reflect the ownership basis on which this property was originally acquired. At page 739 of the record Mr. Cooper testified that the park is now operated by Seaside Park, Inc. and owned by Greenco Corporation which he controls.

Mr. Cooper, his five brothers and two sisters, on what they believed to be an unfavorable market. (R-757) Management of these properties, which were principally Negro rental properties, was placed with a rental agency which had control over repairs, maintenance and collections. While the record indicates that Mr. Cooper may be vice-president and a director of this corporation, the only active participation in its affairs shown is that he had been selected by the other heirs to offer them to the local slum clearance authority, which he did, and that he had participated in their sale to this authority.[3] One of Mr. Cooper's brothers received the rental checks from the agents and made necessary mortgage payments. Mr. Cooper testified he did not know what office, if any, he holds in this corporation. (R-757, 771, 773)[4] For the purpose of preparing himself for the management of a television station, he visited several stations and attended and graduated from a course of study, RCA's Television Technical Program, conducted in Camden, New Jersey. Mr. Cooper proposes to devote forty-four hours per week to the station as its general manager. He has had no prior broadcast experience.

9. In its proposed findings and exceptions, Portsmouth contends that Beachview has failed to sustain point 8 in its points of reliance (see Appendix A) insofar as Mr. Cooper is concerned in view of evidence allegedly derogatory to his character qualifications. Beachview contends initially that this evidence does not reflect adversely on the character

[3] The record is not clear as to whether all or only a part of these properties had been disposed of in this manner.

[4] Portsmouth contends that this interest should have been shown in the application of Beachview. Table II of Section II, Page 4 of the application requests "the principal occupations and businesses in which each party named is engaged at the present time or has been engaged at any time during the past five years, and, in addition [the statement of] any other business or financial enterprise in which such party has now or within the past five years has had either a 25% or greater interest or any official relationship. . . ." There was no necessity that Mr. Cooper disclose this interest on the basis of his ownership interest of 12½%. If an officer and director, this interest technically should have been disclosed. We deem this to be a technical matter of little or no consequence as its omission or inclusion could in no manner have affected Commission consideration of the application.

qualifications of either Beachview or Mr. Cooper; secondly, that it cannot be considered as it is not admissible under Beachview's point 8 and Portsmouth asserted no point of reliance as to the character qualifications of any of Beachview's principals.

10. The matters of record asserted are (1) the conviction of an employee of a concessionaire of one of the amusement parks under Mr. Cooper's supervision, of violating the gambling laws by operating a game of chance in which merchandise prizes were awarded, (2) two occasions on which the Alcoholic Beverage Control Board found violations of Virginia laws relating to the dispensing of alcoholic beverages in connection with the dispensing of beer in the amusement parks, (3) that at one period a burlesque show was operated in one of the parks, and (4) his interest in Tanhen Company, Inc. which Portsmouth contends owns and operates Negro slum properties. Portsmouth concedes that Mr. Cooper was not personally concerned in the commission of the acts at the amusement parks involved in the above matters, but contends that the parks were under his supervision and they therefore reflect adversely on him.

11. The record discloses, however, that the violation by the park concessionaire occurred in 1951 and the violations in connection with the dispensing of beer in 1952, both dates being subsequent to the time at which Mr. Cooper testified he had been more or less retired. Evidence shows the management organization in the case of Ocean View Amusement Park to be a general manager, assistant manager and various department heads. Seaside Park is likewise under the supervision of a general manager. The general managers are the responsible heads of each park. The record also discloses that Mr. Cooper was not personally present at the time any of the violations occurred.

12. Mr. Cooper and his associates have operated Ocean View Park approximately 10 years, Seaside Park approxi-

mately nine years and Seaview Beach approximately eight years. (R-768) Approximately 3,000,000 individuals patronize these parks annually. (R-771) Due to the seasonal nature of the business, difficulties have been experienced in securing reliable employees. (R-743) Relative to the charge that at one period a burlesque show was operated in one of the parks, the record discloses that the show was operated by lessees, that the lessor had no knowledge of the intent of the lessees to so operate at the time of entering into the lease and could not thereafter prevent it under the terms of the lease. The record also shows that the lessee was paid $5,000 to accelerate the termination of the lease in order to effect a discontinuance of this show. Relative to the interests of Mr. Cooper in Tanhen Co., Inc., findings of fact concerning this charge have previously been made.

13. *Irvin M. Kipnes*, secretary and director, was born in Hudson, New York in 1925. Mr. Kipnes now resides in Virginia Beach, Virginia. He attended public schools in Hudson and did some reporting there for a daily newspaper while in high school and for a short time thereafter. He then came to Washington, D. C. as a reporter for the Washington Times-Herald. For about a year (1946-47) he reported for "Broadcasting-Telecasting" magazine. In February 1947, Kipnes left the magazine to become Secretary and General Manager of Cavalier Broadcasting Corporation, at that time an applicant for new A.M. stations in Norfolk, Virginia and Hagerstown, Maryland. After grant of a construction permit therefor, Cavalier placed Station WCAV at Norfolk in operation on Dec. 7, 1947. Mr. Kipnes left Cavalier in April, 1948 and subsequently sold to the corporation his 5 shares of stock therein. He next assisted in the organization of Beachview which, in August of 1948, filed applications for radio and television stations in Norfolk. In 1948-49 he had periods of employment with radio stations WSID, Baltimore (as

Commercial Manager) and radio station WDEM, Providence (as General Manager). In 1950 Kipnes organized and became president and a 50 percent stockholder of a real estate firm in Arlington, Virginia, a financially unsuccessful venture which was dissolved in 1952. At that time he became an account executive with a Washington advertising firm. As such, he participated, from the agency standpoint, in the production of television shows in the television markets of Virginia. His duties in this connection included buying of station time, arranging formats, specifying types of sets and specifying the number of floor men required. He resigned this position in July, 1953, returning to Norfolk and Beachview. Kipnes is a member of the National Press Club, Washington; the Radio Correspondents Association; Norfolk Chamber of Commerce; and B'nai Brith of Norfolk. He was formerly a member of the Advertising Federation of America, the Providence, R. I. Chamber of Commerce, and the Providence Red Cross and March of Dimes Radio Council. Mr. Kipnes was responsible for the preparation of the programming and policies, in addition to a number of other phases, of the proposals of Beachview submitted in this proceeding. (R-512 565, 571, 600-604) He would devote full time to Beachview as its Commercial and Assistant General Manager.

14. In its proposed findings and exceptions, Portsmouth contends, as with Mr. Cooper, that Beachview has also failed to sustain point 8 in its points of reliance insofar as Mr. Kipnes is concerned in view of evidence adduced allegedly derogatory to his character qualifications. Beachview here again contends that this evidence does not reflect adversely on the character qualifications of either Beachview or Mr. Kipnes; further, that it cannot be considered in that Portsmouth asserted no point of reliance as to the character qualifications of any Beachview principal.

15. Briefly, the matters asserted by Portsmouth are 1) that Mr. Kipnes has demonstrated instability in his various

positions and 2) relative to his conduct in effecting a sale of his stock interest in Cavalier Broadcasting Corporation. Basic findings have been made in paragraph 13 above concerning Mr. Kipnes's various positions.

16. Relative to the second charge made, Mr. Kipnes was initially secretary and a director of Cavalier.[3] In early 1948, by vote of the majority stockholder, now deceased, he was voted out of these positions.[3] At that time, he held 10 percent of the issued stock (five shares) and a Mr. Light held the remaining 90 percent. Morris D. Schwartz, Esq., who at that time was associated with Cavalier Broadcasting Corporation as vice-president, a director and attorney for the corporation, testified in the instant proceeding. His testimony confirmed that of Mr. Kipnes concerning the removal of Kipnes as an officer and director of the corporation. He further testified that at the meeting resulting in this action, certain charges concerning Mr. Kipnes's conduct were made by Mr. Light, but that his recollection of the exact charges made and of Mr. Kipnes's responses was hazy. Mr. Schwartz also testified that subsequent to this action, in the summer of 1949, in a letter addressed to him Mr. Kipnes stated "He had received an offer for his stock in Cavalier from the Communist Party and that he did not want to sell it to them, but if we would meet his terms, we could buy it." Mr. Schwartz further testified that in subsequent telephone conversations Mr. Kipnes stated "He was reluctant to do anything that would hurt us in any way, that on the other hand, if we wouldn't buy the stock, he was inclined to go along with them." Mr. Schwartz was unable to state the exact amount he believed Kipnes allegedly stated had been

[3] In his biography (Beachview Exhibit 4, page 3) it is stated "Mr. Kipnes resigned as secretary and general manager of Cavalier Broadcasting Corporation in April of 1948." He testified that he resigned as general manager, but was given no opportunity to resign as secretary and director. Reason given by Mr. Kipnes for his removal as an officer and director was to effect a cancellation of certain stock subscription rights he held which right the majority stockholder believed to be unfair.

offered him by the Communist Party, but believed it was about $1800 or $2000. On July 8, 1949, Mr. Kipnes's stock was reacquired by Cavalier for a price of $1000. At the time this stock was reacquired, Mr. Kipnes executed a release of any rights he might have to acquire up to a 35 percent stock interest in Cavalier. Both parties released all other claims for salary, compensation, earnings, dividends, suits, judgments or causes of action then existing. Mr. Kipnes testified prior to Mr. Schwartz in this proceeding and did not resume the stand to rebut Mr. Schwartz's testimony.

17. *Vernon T. Myers*, vice-president and director, has resided in Norfolk, Virginia all of his life. He has been continuously in the contracting business since 1920 and has constructed some of the largest housing developments in the Hampton Roads area. Primarily, however, he has been a development contractor, specializing in commercial work. Mr. Myers is secretary of the Virginia Cruise Corporation which is concerned with cruises of businessmen to South America, which are co-sponsored by the Virginia State Chamber of Commerce and the Norfolk Port Authority. He has been interested in scout work for thirty-one years, receiving scouting's highest award, the Silver Beaver, in 1937. At the time of the hearing, he was semi-retired from his contracting business and planned to withdraw from it almost completely by 1955. Mr. Myers is a member of the following organizations in the Norfolk area: Lions Club of Norfolk, American Legion and 29th Division Association, Isaak Walton League, Masonic Order, Travel Protective Association, Norfolk Yacht and Country Club, Norfolk Chamber of Commerce, Virginia State Chamber of Commerce, U. S. Power Squadron, and Twenty-first Street Business Area Association. He has had no prior broadcast experience. He would devote 24 hours per week to the station in the supervision of certain local programs and in securing of talent for live shows.

18. *Paul O. Hirschbiel*, treasurer and director, is a lifelong resident of the Norfolk area. He is a graduate of Rutgers University Graduate School of Banking. Beginning as a runner for the Seaboard Citizens National Bank in 1928, through successive promotions he has become vice-president of the Seaboard Citizens National Bank, Norfolk. Mr. Hirschbiel has actively participated, at times in an official capacity, in the work of the following organizations in the Norfolk community: USO, Travelers Aid Society, Turney Home for Boys, Norfolk Council of Social Agencies, Civilian Defense, Community Chest, Virginia Bankers Association, Norfolk Chamber of Commerce, Optimist Club of Norfolk, March of Dimes, Red Cross, Mental Hygiene Society, Cancer Society, Talbot Park Civic League, Citizens Committee for Traffic Safety, Norfolk Sports Club, Downtown Businessmen's Club, and the Norfolk Yacht and Country Club. He has had no prior broadcast experience.

19. The record shows that Mr. Hirschbiel expects to devote twenty-four hours weekly to the day-to-day operation of the station on a planned schedule,[6] concentrating his efforts on financial matters and the so-called "public service" phases of programming. His principal duties would be to arrange with local organizations for their participation in such programs and to some extent, this work would be performed in connection with his present civic activities. He would have no direct supervision with respect to actual production of the programs and would not participate in their production. Counsel for Portsmouth called Mr. Roy Dudley, executive vice-president of the Seaboard Citizens National Bank in an effort to determine whether Mr. Hirschbiel could engage in the affairs of Beachview as indicated. Mr. Dudley's testimony establishes that officials of the bank do not have a rigid schedule as to hours, that

[6] 2:00 p.m. 6:00 p.m. M.T. Th.; 2:00 p.m. 8:00 p.m. W.; 2:00 p.m. 4:00 p.m. F.; 9:00 a.m. 1:00 p.m. Sat.

they do what they can to help clients "such as are associated with Beachview," and that Mr. Hirschbiel has occasion in behalf of the bank "to engage in contacts with folks in the community on civic matters and things of that sort." (R-1799-1803) When asked as to Mr. Hirschbiel's hours at the bank, he testified "we usually go to work at 9:00 o'clock, or 9:15 at the latest. Then we stay until 1:00 or 1:15 and to to (sic) lunch, come back and work until 3:00, 4:00 or 5:00, maybe 7:00, if necessary. It depends—in the meantime, of course, we do a lot of outside work occasionally." He further testified "we do not have any, regular hours. We have never had any. In other words, we have never been told how late we should stay or how many hours we should put in a week." When asked the positive question "do you know how many hours he (Mr. Hirschbiel) puts in now at the bank?" Mr. Dudley responded, "no, sir."[7]

20. *Dr. William Gerald Akers*, vice-president and director, has resided in the Norfolk area for twenty-three years. He holds an M.A. degree from the University of Kentucky, and a Ph.D. degree, *magna cum laude*, from the University of Heidelberg. He has attended several European universities. In September, 1931, Mr. Akers was appointed Assistant Professor of Modern Languages at the College of William and Mary, Norfolk Division. In 1945, he was made head of the Division of Languages, Music, and Fine Arts at the college, and presently holds this position. He is senior member of the faculty and is Chairman of the Director's Faculty Advisory Committee. Akers' civic, professional, cultural and related associa-

[7] Mr. Hirschbiel testified that he had discussed with Mr. Dudley the hours he proposed to devote to the television operation. Mr. Dudley testified that Mr. Hirschbiel had discussed with him his participation in Beachview, but did not discuss the hours he proposed to devote to the television operation. Portsmouth contends this conflict places justifiable doubt on the veracity and candor of Mr. Hirschbiel's testimony under oath. However, in view of the overall testimony on this matter, particularly Mr. Dudley's that he paid very little attention to this matter, in addition to the testimony set forth above, we cannot attach the significance to this conflict in terms of veracity and candor urged by Portsmouth.

tions include: Norfolk Chapter of the American Association of University Professors (president for three terms); Virginia Chapter, American Association of Teachers of Spanish (president for two terms); American Association of Teachers of German; Norfolk Chapter of Round Table International; Norfolk Central YMCA's Junior Advisory Council; Norfolk City Manager's Crime Conference; Norfolk Little Theatre; director, William and Mary Concert Series; Feldman Chamber Music Society; Norfolk Film Society; and Virginia Society of Ornithology. He has actively engaged in slum clearance work. Since 1937, he has appeared on various radio and television broadcasts. He has served as chairman of the Committee on Television of the College of William and Mary. In this capacity he was responsible for providing weekly programs of a varied nature over Station WTAR-TV, Norfolk. Following a planned schedule, he would devote a minimum of ten hours weekly to the day-to-day operation of the station, concentrating on directing the station's educational programming.

21. *John R. Roughton*, vice-president and director, has resided in Norfolk for the past twenty-five years. He has been an automobile dealer for many years, and is now president, general manager and a 66⅔ percent stockholder of Roughton Pontiac Corporation. He has substantial real estate holdings. Over a period of time he has delegated operating authority in his business to such a point that he devotes a very substantial portion of his time to civic activities and institutions including: Leigh Memorial Hospital (member, Board of Directors); Norfolk Chamber of Commerce (member, Board of Directors); Norfolk Kiwanis Club (member, Board of Directors); Norfolk Community Chest; Virginia State Chamber of Commerce; Talbot Park Civic League of Norfolk (president); and the Norfolk Executives Club. Roughton is a Mason, a member of the Norfolk Country Club, and past president of the Norfolk-Portsmouth Automobile Dealers Association. He is an elder and trustee of Royster Memorial Presbyterian

Church of Norfolk. He would devote twenty-four hours weekly on a planned schedule, toward religious and health programming. This would include the securing of ministers, physicians, civic leaders and the like for program appearances. He has had no prior broadcast experience.

22. *Francis V. Guidice*, director, was born in Maryland in 1917 and is a resident of the Washington, D. C. area, but plans to move to Norfolk to devote full time to Beachview as production manager. After service in the Army, he was successfully employed by the Veterans Administration and Military Intelligence. Subsequently, he enlisted in the U.S. Maritime Service where he received training as a communications officer. In 1945, Mr. Guidice was employed as an engineer by Radio Station WITH in Baltimore. Later, he handled the planning and installation of Radio Station WLEE, Richmond, Virginia. He resigned from his position with WLEE in 1947 to accept a Civil Service position as an engineer with the Armed Forces Radio Service. He remained in this position for several months, resigning to join the DuMont Television Network's new Washington, D. C. outlet, WTTG, as an engineer. Shortly thereafter, he was transferred to the production department as a director and, at the time of his testimony, was senior producer-director and assistant operations manager of WTTG. Among the network shows he is producing or has produced are: "Meet Your Congress," "The Big Issue," "Washington Exclusive," and "Leave It To The Girls." The last is a network show originating from ABC in New York City. In addition to these programs, Guidice also produces and directs 20 local television shows weekly on WTTG, including "Capitol Caravan," a one-hour variety show featuring all-Negro talent; "Housewives Bazaar;" "TV Disk Jockey;" "The Max Rosnick Show," an all-Jewish variety program, and news and sports programs. He has produced all of the remote programs originating for the DuMont network in Washington, including presidential speeches from the White

House and Congressional hearings. Other programs which he has produced for the DuMont network include such shows as: "Georgetown Forum," which, under his direction, won a Peabody Award for program excellence; "Pentagon Washington," a public service program for the Department of Defense; "Tris Coffin's Washington Report;" and the 1948 and 1952 Presidential Inaugural parades and balls. He also produced "Keep Posted," sponsored by the Curtis Publishing Company; "The Washington Senators' Baseball Games;" and a "Muscular Dystrophy Telethon." The record does not reveal his participation in any civic activities. He did not attend any of the directors' meetings held by Beachview prior to the time of the hearing.

23. *Ruth Anne Flaherty*, director, was born in Minnesota in 1924, and now resides in Cedar Rapids, Iowa where she is employed by television station WMT-TV. She intends to move to Norfolk to devote full time to Beachview as its director of women's and children's activities. A graduate of the College of St. Catherine, St. Paul, Minnesota, with an A.B. degree in speech, Mrs. Flaherty from 1945 to 1949 was variously employed as a stewardess with Northwest Airlines, Field Director of the Spokane (Washington) Council of the Girl Scouts, Co-Director of the Gunga Din Youth Center, and a teacher in the Hawthorne Elementary School, Hawthorne, California, and in the Spokane City School System. In September, 1949, she became Field Director of the Montgomery Council of Camp Fire Girls, Potomac Area Council, Washington, D. C., a position which she held until June 1951. She has taught in the Pre-School Department of the University of Maryland. Mrs. Flaherty has had experience as a television actress and has written and produced television programs. For three years she has produced her own television children's show, known as "Miss Ruth Anne's Kindergarten," first over WTOP-TV and WMAL-TV in Washington, D. C.,

and presently over WMT-TV in Cedar Rapids. She wrote, narrated, and produced a fashion show for WMAL-TV; and, in conjunction with her husband, William Flaherty, produced a "how-to-do-it" type of program for WMAL-TV. As an actress, Mrs. Flaherty has appeared on four NBC network religious productions of "Frontiers of Faith." She has participated in panel shows and in several kinescopes for the ABC television network. In recent years she has volunteered much of her time to training Camp Fire leaders and to giving talks on child psychology and parent-child relationships to mothers' groups and Parent-Teachers Associations. In addition to her work with the Camp Fire Girls, she has been active in the Sodality, the Council of Lay Hospital Donors, and as a Community Chest Volunteer. She has never been a resident of Norfolk and has no civic ties there.

Portsmouth Radio Corporation

24. Portsmouth Radio Corporation is a Virginia Corporation presently authorized to issue 25,000 shares of Class B voting stock having a par value of ten cents, and 19,950 shares of Class A non-voting stock having a par value of fifty dollars. Prior to November 11, 1953, the corporation had only common voting stock, par value of fifty dollars. The 2780 shares then outstanding were held by 26 stockholders, 25 being the original stockholders at the time of grant on July 8, 1953 of application File No. BTC-45-8 for transfer of control of Portsmouth Radio Corporation.[8] On November 11, 1953 the articles of incorporation were amended to authorize 25,000 shares of Class B and 19,950 shares of Class A stock. On this same date holders of the former stock were given the right to exchange their original stock for equal amounts of the new Class A stock, each stockholder also being permitted to subscribe to the same number of Class B shares. 1476 additional shares of Class B voting stock were subscribed by these 26 stockholders and 80 shares by a new stock-

[8] One of the original 26 stockholders, Charles J. Duke, Jr. died in September of 1953 and his stock (200 shares) was held by his executrix.

holder, Carl J. Burkland. Thus on that date 4336 shares of the voting stock were subscribed by 27 stockholders. By November 16, 1953 the number of stockholders had risen to 61 and the number of shares of voting stock subscribed for had risen to 17,634,[9] with the 24 remaining original stockholders having subscribed to 9,984 (58.3%) of these shares.[10] The subscription agreements expressly provided that the right to acquire the stock was subject to action of the Commission, either advising that a transfer of control was not involved, or consenting thereto should it be held that issuance of the stock in conformance with the agreements would constitute a transfer. The subscription agreements also provided that each subscriber would assign and transfer to voting trustees all shares of Class B stock issued to him pursuant thereto in accordance with an attached Voting Trust Agreement, subject to Commission approval. On November 18, 1953 the Portsmouth application was amended reflecting these changes with a further amendment being submitted on November 24, 1953.[11]

25. Eight of the 35 new subscribers to stock of Portsmouth who came in between November 11, 1953 and November 16, 1953 were principals of Tidewater Telecast-

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[9] One of the original 26 stockholders, James J. Gara, was relieved of his subscription and on November 16, 1953 his original common stock was returned to the corporation.

[10] This figure does not include the 200 shares held by the executrix of the estate of Charles J. Duke, Jr., deceased.

[11] In its points of reliance, Beachview contends that in the November 18 amendment Portsmouth made a misstatement of fact to the Commission with its answer of "No" to the question which asks "Are there any documents, instruments, contracts, or understandings relating to ownership, management, use or control of the station or facilities, or any right or interest therein in view of the said stock subscription agreements and voting trust agreement submitted as attachments to the amendment. It also contends that in the amendment submitted on November 24, Portsmouth supplied mutually conflicting statements of fact to the Commission respecting stock held and stock issued. The amendment in response to the question "No. shares issued" shows the figure zero for both the new Class A and Class B stock, whereas the new Exhibit 2-A referred to Class A stock "now held" which in fact was not issued until January of 1954. Beachview asserts that these matters reflect adversely upon the character and background of Portsmouth and the persons associated therewith; hence are comparative factors favoring Beachview. We believe these matters to be so inconsequential as to merit no consideration. The documents referred to by Beachview were submitted as a part of the very amendment leading to the first of these charges. To sustain the charges based on use of the description "Class A stock now held and subscribed" for subscribed stock would be to carry technicalities to the extreme. The amendment fully disclosed the status of this stock.

ing Corp. which at that time was also an applicant for the instant channel. John C. Aspinwall, Jr. was president of Tidewater and as such signed its application (file No. BPCT-1601). In the Tidewater application, the stock shown as subscribed by John C. Aspinwall, Jr. upon issuance was to go in equal amounts to himself, his father, John C. Aspinwall, Sr. and his brother, M. F. Aspinwall, all of whom are now stockholders in Portsmouth. The beneficial interests of his father and brother in this stock were not shown in the Tidewater application as required under Section 2, Page 3, Paragraph 13 thereof. There was also pending for these facilities the application of Chesapeake Service, Inc. As the result of an agreement with Portsmouth involving *inter alia*, the said acquisition of a stock interest in this applicant by principals of Tidewater, the latter's application was dismissed on November 19, 1953 pursuant to a request filed on November 18, 1953 simultaneously with the amendment of the Portsmouth application submitted on that date (see paragraph 24 *supra*). The Portsmouth amendment did not reflect the interest of the said eight of the new subscribers in the Tidewater application being dismissed.[12] Also pursuant to an agreement with Portsmouth, the application of Chesapeake Service, Inc. (file No. BPCT-1602) was dismissed upon request therefor, on December 4, 1953. The agreements provided in part that the stockholders of these two applicants would not participate in any application in competition with Portsmouth. Portsmouth agreed to reimburse both for out-of-pocket expenses incurred in prosecuting their applications. Portsmouth further agreed to pay Tidewater an additional $2500 as reimbursement to Lewis Peterson, its president, for personal out-of-pocket expenses incurred in prosecuting the Tidewater application when and if Portsmouth should receive a construction permit for a VHF television channel. Three of the eight princi-

[12] This fact forms the basis for an allegation of non-disclosure made by Beachview against Portsmouth, Beachview asserting it constituted an interest in a pending application, Portsmouth asserting that filing of the request for dismissal of the Tidewater application terminated such interest. This matter is of small moment.

pals of Tidewater acquiring a stock interest in Portsmouth, J. C. Aspinwall, Jr. & E. T. Gresham, and R. C. Cooke were also elected directors of Portsmouth while still officers and stockholders of Tidewater. On November 16, 1953 these men, acting as directors of Portsmouth, attended a Portsmouth Board of Directors meeting and voted with the 6 other directors present to reimburse Tidewater as shown above.

26. By instrument dated November 12, 1953, Portsmouth established a voting trust agreement under which 11 of the 61 stockholders have been designated as trustees holding all voting rights. This agreement is for a term of three years with automatic renewal yearly thereafter unless rescinded by majority vote of the total number of Class B shares outstanding.[13] This agreement also provided that it was not to be effectuated until the Commission had ruled whether its prior consent was required, and if required, had been given. The agreement further provides that if effectuated, and Commission consent is required for its termination, termination shall not be effectuated until such consent is given. Upon being advised that issuance of the stock in conformance with the subscription agreements would not constitute a transfer of control; but that effectuation of the voting trust agreement would, Portsmouth on January 26, 1954 made its first issuance of the new Class B stock in the amount of 8,107 shares representing the number paid in by that date. Of this amount, 4,882 shares (60.2%) were issued to the remaining 24 original stockholders and 200 shares (2.4%) to the estate of Charles J. Duke, Jr. Application was thereafter made for Commission consent to transfer of control of the Corporation from the stock-

[13] Under Beachview's interpretation of this agreement it is revocable at will by the beneficial owners of the Class B stock. Under Portsmouth's interpretation, the agreement is binding on all stockholders for a period of three years with automatic one year renewal periods thereafter unless rescinded by majority vote of the Class B shares prior to commencement of the next automatic renewal period. We attach no importance to this difference in interpretation by the parties of this trust instrument. If revoked, prior Commission consent before transfer would be required.

holders to the 11 designated trustees which application was approved and granted on June 6, 1954."

"27. Beachview asserts as a point of reliance that the issuance of 8,107 shares of Class B stock on January 26, 1954 (see paragraph 26 *supra*) effected a transfer of control of the corporation without prior consent of the Commission and that such conduct reflects adversely upon the character and background of Portsmouth as an applicant and upon the individuals associated therewith. This contention is based on a showing that after July 10, 1953 and prior to January 26, 1954, additional stock was issued to the original stockholders but was not taken up on a *pro rata* basis. Also as previously found, one stockholder died. Due to these changes, the percentage changes of stock interest are totalled by Beachview at 36.51%. (That is, stockholder A's interest decreased .55%, B's increased 1.66%, C's decreased .37%, etc.) The total of increases plus decreases equals 36.51%. Beachview further asserts that its contention is buttressed by the fact that, using this same method of computation, there was a 49.48% shift in stock holdings among the original group when stock was issued on January 26, 1954. Beachview also contends that after the issuance of the 8,107 shares, the number of these shares (37.4%) issued to the 35 new stockholders plus the shares that had shifted among the original stockholders would be sufficient to control the corporation. It further asserts that "in point of fact, the relative percentage of stock held by one stockholder (George T. McLean) increased so greatly that he, with any one of the original stockholders now holding as little as 3% of the stock, together with the new stockholders of Portsmouth, are now in control of the corporation." However, no assertion is made that at any time during this period any one stockholder or alignment of stockholders attempted to exercise control against a minority alignment. No single stockholder held a majority interest. Beachview has laid no predicate for transfer of control except that of mathematical computation.

[1] Official notice of this fact was taken by the Examiner.

In view of the fact that original stockholders still hold a majority of the voting stock (50.2%) after the issuance of the 8,107 shares on January 26, 1954, and at all times prior thereto, no transfer of control took place; hence, Beachview's point of reliance must fail.

28. The 11 trustees of Portsmouth, the offices they hold and the stock interest of each held through ownership are as follows:

Name	Office Held	Stock Interest: Class A Non-Voting Shares	Class A Non-Voting Percent	Class B Voting Shares	Class B Voting Percent
Hunter C. Phelan[15]	President & Director	520	3.05	520	3.05
Carl J. Burkland[15]	Vice Pres. & Director	280	1.64	280	1.64
George T. McLean	2d Vice Pres. & Director	2040	11.97	2040	11.97
Henry Clay Hofheimer, II	Secy. Treas. & Director	1340	7.86	1340	7.86
R. D. Cooke	Director	140	0.82	140	0.82
E. T. Gresham	Director	400	2.34	400	2.34
J. C. Aspinwall, Jr.	Director	200	1.17	200	1.17
William M. Camp	Director	500	2.93	500	2.93
Joseph W. Luter, Jr.	Director	440	2.58	440	2.58
C. K. Hutchens	Director	200	1.17	200	1.17
R. Porter Hardy, Jr.[16]		300	1.76	300	1.76
		6360	37.33	6360	37.33

[15] Hunter C. Phelan and Carl J. Burkland each, in the event Portsmouth Radio Corporation receives a construction permit, has the right to purchase at ten cents per share 850 additional shares of Class B voting stock. For each month beyond 12 months required to obtain a permit or that he continues in the employ of the corporation after a permit is received, Hunter C. Phelan has the right to purchase 71 additional shares of Class B voting stock at ten cents per share, provided however that the total amount which he is entitled to purchase shall not exceed 1700 shares. Under these rights Hunter C. Phelan could therefore acquire ownership of a total of 2220 shares of Class B stock (includes present subscription to 520 shares) and Carl J. Burkland could acquire ownership of 1130 shares, (includes present subscription to 280 shares). A further provision is that in the event, during the first year of operation, additional Class B stock is issued, an additional 15% is to be issued with Hunter C. Phelan being entitled to subscribe to two-thirds of such amount, and Carl J. Burkland to one-third of such amount at the price at which such shares are proposed to be sold. If the existing rights should come into being and be exercised, Hunter C. Phelan would acquire a total of 2450 shares of Class B stock and Carl J. Burkland a total of 1253 shares. Thus 5416 shares (21.66%) of voting stock remain unsubscribed and are not presently committed except as affected by the rights of Phelan and Burkland under the above proviso which apparently gives them first call on a portion of this stock if issued during the first year of operation.

[16] R. Porter Hardy, Jr. was elected a director on January 16, 1954. A petition for leave to amend the application to reflect his election was denied by the Examiner on February 9, 1954 which action was sustained by the Commission on March 26, 1954.

29. *Hayden C. Phelan*, president and director, was born in Ft. Worth, Texas in 1893. His residence since 1939 has been Bay Colony, Virginia. He has engaged in the food business the major portion of his time for many years. In addition to his present interests in Colonial Stores, Inc. and National Food Products Corp., he is a director and stockholder of the National Bank of Commerce of Norfolk, Virginia. Mr. Phelan has organized and been an official of trade associations, and from the National Recovery Administration days through the Second World War he actively participated in various phases of Federal regulation of the food and related industries. Mr. Phelan has engaged in a wide variety of civic activities including the Community Chest, of which he is past president, past co-chairman and presently member of the Executive Committee and a director; Kings Daughters, Advisory Committee; YMCA, Board of Management; Boys Club; and the Norfolk Industrial Commission, chairman. Other activities have included the Norfolk Foundation, Norfolk Passenger Transportation Commission; Norfolk Port Authority; Norfolk-Hampton Roads Area Navy Employment Committee; and USO Auditorium Committee. In 1953, he received the "First citizen of Norfolk" award made by the Cosmopolitan Club. Since November of 1953, Mr. Phelan has devoted full time to the affairs of Portsmouth and would continue to do so in the event it receives a television grant. He has had no prior broadcast experience.

30. *Carl J. Burkland*, vice-president, general manager and director, has lived in the so-called Tidewater area since approximately August 1, 1953. His entire vocational and business career has been in broadcast work. Between 1929 and 1941, he was first announcer and later salesman, assistant sales manager, and sales manager of radio station WCCO, Minneapolis, Minnesota. From October, 1941 to November, 1942 he was on CBS's Radio Spot Sales staff; from November, 1942 until January, 1948, Mr. Burkland

served as general manager of station WTOP, the CBS outlet in Washington, D. C. In this position, he was responsible for the supervision of all departments of the station with respect to the overall operation and the initiation and carrying out of station policies. He was also largely responsible for maintaining the station's contact with the community of Washington in its "public service" endeavors. From January, 1948 to September, 1950, Mr. Burkland was general sales manager of CBS's radio and TV spot sales and from September, 1950 to July, 1953, director of CBS Station Administration. Since the end of July, 1953, Mr. Burkland has served as general manager of Portsmouth Radio Corporation and AM Station WAVY. He has devoted his full time to these duties and in the event of a grant of a permit to Portsmouth would devote his full time to the operation of the television station as its general manager. His membership in civic organizations includes: Boy Scout Fund Drive, New York, 1952; Kiwanis Club, Washington, D. C., 1945-1948 (received Award of Merit from Washington Board of Trade in December 1947); The Washington Manufacturers Representatives Association, 1943-1948; The Minneapolis Manufacturers Representatives Association, 1938-1941; member of Portsmouth Chamber of Commerce, Norfolk Chamber of Commerce, Norfolk Advertising Club, and of Tidewater Sales Executive Club. When Mr. Burkland left WTOP in 1948, he was given a testimonial by the Washington Board of Trade for his service as a member of that organization.

31. Mr. Burkland first became interested in television in Norfolk in 1950 and took steps to establish contacts with local residents. He first went to Norfolk in May of 1952 and through "Charlie" Duke a group was subsequently organized which in July of 1953 purchased radio station WAVY. Mr. Burkland at this point held no ownership interest in the licensee, but throughout the period of organizing this group, he contemplated holding a stock interest

in the company and being its general manager (R 957). His understanding with the company called for a stock interest at the time a television construction permit was received and that he was to become general manager of the station. He severed his employment with CBS on July 28, 1953 and became general manager of WAVY on a salary arrangement. By resolution passed on November 14, 1953, a contract of employment between the corporation and Mr. Burkland at a salary of $15,000 per year and creation of an employee incentive fund were authorized. Provision was also made for the acquisition of ownership interests by Mr. Burkland and Mr. Phelan. This action was reflected in an amendment to the Portsmouth application submitted on November 18, 1953. This amendment did not reflect Mr. Burkland's previous employment as manager of station WTOP.[18]

32. *George T. McLean*, vice-president and director, was born in 1898, and has been a resident of Portsmouth since birth. His vocational life has centered mainly in the real estate, contracting and building materials businesses. In addition to his interest in this applicant, his recent activities and holdings are reflected in 18 such enterprises in the Portsmouth area. He organized a Portsmouth Redevelopment and Housing Authority in 1940 and has served as its chairman continuously; helped organize Portsmouth Sport Club and served as its first president; served as president of Portsmouth Community Chest, 1942-1948 inclusive; and served as vice-president of the Portsmouth Chamber of Commerce. He was named First Citizen of Portsmouth for 1944. Governor John S. Battle appointed Mr. McLean to the Advisory Council on the

[18] So far as the record shows, no definite agreement had been reached by the parties at this time as to the stock interest to be acquired by Mr. Burkland, or as to his employment as station manager.

[19] Mr. Burkland held no interest in this station. Beachview contends however that the amendment should have shown his connection with WTOP. This is another of the minute matters used in this proceeding which is of no [illegible] importance. We consider the matter of no significance.

Virginia Economy in 1951 and subsequently reappointed him for an additional term of 3 years to end June 30, 1956. He is a member of the Wright Memorial Methodist Church, Portsmouth Chamber of Commerce, Retail Merchants Association, Elks, Moose, Portsmouth Sports Club, American Legion, Elizabeth Manor Golf and Country Club, Portsmouth Assembly and the Cavalier Club of Virginia Beach. Devoting about 5 hours per week to the station, he will be a member of Portsmouth Advisory Committees on community relations and governmental relations. He has had no prior broadcast experience.

33. *Henry Clay Hotheimer, II*, secretary-treasurer and director, was born in 1906, and has lived in Norfolk all his life. He is an officer and or principal stockholder in 24 companies, located mostly in Virginia, with some in other parts of the south and in the southwest. Among them, the banking, railroad, building material, sand and gravel, coal and oil business are represented. He is at present vice-chairman of the City Planning Commission of Norfolk; a member of the Advisory Committee of the Norfolk Port Authority; member of the Board of Trustees and Executive Committee of the Norfolk Museum of Arts and Sciences; trustee of the Norfolk Academy; trustee of the Norfolk General Hospital; trustee of the Norfolk Orchestral Association; trustee of the Norfolk S.P.C.A.; trustee of the Jamestown Corporation (producer of the historical pageant Common Glory) and director of the Norfolk Association of Commerce; director of the Norfolk Industrial Commission; a Friend of William and Mary College; director of the Norfolk Y.M.C.A.; member of the Virginia Advisory Committee for the 350th anniversary commemorating the Landing at Jamestown; member of the Norfolk Mace Committee; and member of a Committee on Scholarship for the University of Virginia and a member of the Advisory Board for the William and Mary Endowment Fund.

In addition, Mr. Hofheimer, at the request of the president of the University of Virginia, served on a group which raised a million dollars to provide a graduate Business Management School for the University. Also, one of the corporations of which Mr. Hofheimer is an officer, director and 25% stockholder (Southern Lightweight Aggregate Corporation) has established a $1500 scholarship in Design Engineering to students at the University of Virginia, Virginia Military Institute and Virginia Polytechnic Institute. Mr. Hofheimer would devote approximately 15 to 20 hours per week to the affairs of the station. His work as secretary-treasurer now requires something over 6 hours per week and, in the event of a grant to this applicant, he would also serve as a member of the station's Advisory Committees on Education and Community Relations. He has had no prior broadcast experience.

34. *R. D. Cooke*, director, was born in Norfolk in 1880 and has lived there all his life. He has engaged in the practice of law in Norfolk since 1902. He was Mayor of Norfolk, 1946-1948, and Councilman of Norfolk, 1946-1950. His membership in civic and other local organizations includes the first Presbyterian Church (Deacon Emeritus); Princess Anne Country Club; Virginia Club; Norfolk Yacht and Country Club; Norfolk-Portsmouth Bar Association (president 1947-1948); United War Fund Campaign (1942); USO Auditorium Committee (chairman 1942); Norfolk Protestant Hospital (director since 1935); Norfolk Community Chest (member of Executive Committee and director 1942-1952, and chairman of 1931, 1941 and 1942 campaigns); Mary F. Ballantine Home for Old Ladies (vice-president and member of Board of Directors since 1933); Navy YMCA (member of Board of Management since 1933); and Mary Baldwin College, Staunton, Virginia (trustee for 10 years). In 1942 he was elected First Citizen of Norfolk. Mr. Cooke is presently a partner of the law firm of Willcox, Cooke, and Willcox; a

director of Royster Guano Company, Norfolk, Virginia; a director and stockholder of the National Bank of Commerce, Norfolk, Virginia; and president, director and one-third stockholder of Will Cooke, Inc., Norfolk, Virginia (real estate holding company). He will be a member of the Advisory Committee on community relations and would devote about 15 hours per week to the affairs of the station. He has had no prior broadcast experience.

35. *E. T. Gresham*, director, was born in Indiana in 1892, and has resided in Norfolk for the past 38 years. He has been president and principal stockholder of E. T. Gresham Company, Inc., Norfolk, Virginia (building contractors) for 37 years and director and stockholder of the Commonwealth Natural Gas Corporation, Richmond, Virginia since 1951; a director and stockholder of the National Bank of Commerce, Norfolk, Virginia for 7 years and a director of the Virginia Mutual Insurance Company of Richmond, Virginia for 15 years. He was named First Citizen of Norfolk in 1951. His membership in civic and other local organizations include Committee of Distribution of the Norfolk Foundation; vice-president and director of the Boys Club; past director of the YMCA; member of the Navy Employment Committee; member and director of the Salvation Army; and member, past president and director of the Rotary Club; member of the Masonic Lodge; and member of the First Baptist Church. Mr. Gresham is a past president and has served on the Board of the Norfolk General Hospital for many years and is chairman of its fund-raising campaign to provide improved facilities. He is also chairman of the Hampton Road and Sanitation Commission created by the Virginia Legislature to combat pollution in the Hampton Roads area. He has been a member of the Advisory Board of the William and Mary College, Norfolk Division, since its creation. As a member of the Welfare Commission of the City of Norfolk for the past 3 years, Mr. Gresham has worked on such problems as the establishment of a Youth Detention Center and a

Hospital for the Aged. He has also served as president and director of the Norfolk Community Chest. As chairman of the station's Advisory Committee on governmental relations, Mr. Gresham plans to devote approximately 20 hours per week to the station in contacting various naval, governmental and civic organizations with which he is identified relative to station programming and promotion. He has had no prior broadcast experience.

36. *John C. Aspinwall, Jr.*, director, was born in Norfolk in 1917 and has resided there his entire life. During World War II, he was with the U. S. Navy Supply Corps serving in the Pacific area for approximately 20 months with Service Squadron 10. His main business interest is warehousing. Mr. Aspinwall's civic and other activities include past president and director of the Norfolk Club; former director of the Tidewater Council of the Boy Scouts of America; member of the Boards of the Salvation Army and Norfolk chapter, American Red Cross; past fund campaign chairman of the Red Cross, and present vice-chairman of the Norfolk chapter; member of the Board of the Muscular Dystrophy Association and of the Leigh Memorial Hospital of Norfolk; member of the Board of the National Defense Transportation Association; former member of the Norfolk Army Advisory Council and member of the Board of the Girls Club. He has had no prior broadcast experience. He would devote 15 to 20 hours per week to the station as a member of the community and Armed Services Relations Advisory Committee.

37. Relative to his failure to disclose in the Tidewater application that the stock shown as subscribed by him was in fact to be owned by himself, his father, and his brother (see paragraph 25), and was to be so issued, Mr. Aspinwall testified "I subscribed to stock in Tidewater Telecasting Corporation at the outset with the intent that when the stock was issued the stock would then be issued in the name of the three of us, split three ways. In other words,

we usually do everything together, if you know what I mean; and I am acting in behalf of my family." The Examiner further found with reference to this matter that "as a witness, Aspinwall, Jr. was frank and appeared to be desirous of telling the truth about the matter; there was no indication by demeanor or testimony that could lead to the conclusion that he willingly filed the application—knowing that it contained a misstatement—with the intention of deceiving the Commission in a matter about which the Commission had a right to know the truth." On the basis of our review of the record testimony we are in accord with this finding. Further these three individuals are now members of Portsmouth and their biographies, placed into evidence in this proceeding (Portsmouth Exhibit 2, pages 12, 19 and 20), disclose nothing which would reflect adversely upon their qualifications as stockholders.

38. William M. Camp, director, was born in 1900 in Franklin, Virginia, and has resided there to date except for two periods aggregating 15 years, which he spent attending to family business matters in South Carolina. His business interests include the manufacture and sale of pulp, paper and lumber, railroad company, concrete products and banking. While residing in Marion, South Carolina, he was active in civic organizations. Locally his activities have included: Board of Deacons, First Baptist Church, Buritan Club; Camp Foundation (a charitable organization providing community and recreational work in Franklin); Carrie S. Camp Foundation, Inc.; Virginia Student Aid Foundation; Franklin Playgrounds, Inc.; and Rural Exposition (a non-profit organization sponsoring the Virginia State Fair). In addition, Mr. Camp has served six years on the Board of Managers of the University Alumni Association of the University of Virginia and is a trustee for the Woodberry Forest School. He has been chairman of the Franklin District Democratic Committee for 8 years, has served on community fund drives in Franklin on a number of occasions, and has served as a director for 7 years on the

Old Dominion Area Council of the Boy Scouts of America, Suffolk, Virginia. In connection with his work with the Camp Foundation and Camp Manufacturing Company, he handles all relations with the Negro preachers and Negro churches of the Franklin community. Mr. Camp will serve on Portsmouth's Religious Advisory Committee and would devote about 20 hours per week to the affairs of the station. He has had no prior broadcast experience.

39. *Joseph W. Luter, Jr.*, director, was born in Smithfield, Virginia in 1908 and has lived there all his life. Mr. Luter is president of the Smithfield Packing Company, Inc.; president of the Merchants and Farmers Bank of Smithfield; and is the secretary-treasurer of the Luter Packing Company, Laurinburg, North Carolina. He is a member of the following organizations: Trinity Methodist Church, Smithfield, Virginia (trustee); Smithfield German Club, of which he is past president and presently a member of the Board of Directors; Virginia State Chamber of Commerce; Virginia Manufacturers Association; Board of Directors of Tidewater Wholesale Food Dealers Association; and Farm Bureau Federation of Isle of Wight. Mr. Luter formerly belonged to the Rotary Club, resigning because farm meetings interfered. In 1949 he headed a committee which successfully raised funds to build a community center in Smithfield and personally contributed $20,000 for this purpose. He was instrumental in establishing laboratories, since taken over by the Virginia Department of Agriculture for the study of peanut cultivation and hog production. He would devote about 15 to 20 hours per week to the station as chairman of the Agricultural Advisory Committee. He has had no prior broadcast experience.

40. *Charles K. Hutchens*, director, was born in 1896 in Radford, Virginia and has been a resident of Newport News for 54 years. He holds interests in a variety of businesses including automobile and general appliance

sales, toy manufacture, garments, banking and savings association.[19] Mr. Hutchens' membership in civic and other organizations include the following: Trinity Methodist Church; Rotary Club; Masonic organizations; Pioneer Club of Newport News; Propeller Club; Riverside Hospital, (Senior member, president of Board, acting treasurer); Community Chest (co-chairman of special gifts drive 1953); Newport News Chamber of Commerce (past president and treasurer); War Memorial Museum of Virginia (treasurer); chairman of Red Cross drive 1951; Elks; I.O.O.M.; Tidewater Automobile Association (vice-president and chairman of board); and Peninsula Association of Commerce (treasurer and chairman of Legislative Committee). Mr. Hutchens is a member of the Virginia State Legislature. He will be a member of Portsmouth's Advisory Committee on community relations and would devote about 15 hours weekly to the station in this position. He has had no prior broadcast experience.

41. *Porter Hardy, Jr.*, (see footnote 16, page 17) was born in Virginia in 1903 and has lived in the Tidewater area all his life except for a period of employment in New York and a period of 5 years spent as a wholesaler of electrical equipment in Salisbury, Md. He was graduated from Randolph-Macon College and later attended Harvard Graduate School of Business Administration. Mr. Hardy has resided in Churchland, Virginia since 1932 where he owns and operates farming property on a partnership basis with one C. F. Casteen. He was elected to the Eightieth and successive Congresses of the United States. Mr. Hardy was responsible for the organization of the Norfolk County Farm Bureau and the Association of Virginia Potato and Vegetable Growers. During World War II he was chairman of the Virginia State AAA Committee and Virginia Agricultural War Board, U. S. Department of Agriculture. In 1951, he was named First Citizen of Portsmouth. Mr.

[19] Mr. Hutchens is also 50% owner of the Young Men's Shop in Newport News. The nature of this business is not shown in the record.

Hardy is a member of the Methodist Church, Moose, Kappa Alpha Fraternity and honorary member of the Norfolk Rotary Club. He will be a member of Portsmouth's Agricultural Advisory Committee and of the Committee on Governmental Operations. In these capacities he proposes to devote approximately 20 hours weekly to the station when Congress is not in session. Mr. Hardy has had no prior broadcast experience.

42. Portsmouth takes exception to the failure of the Examiner to make findings and conclusions based thereon relative to each of its remaining 50 stockholders who are not officers, directors or voting trustees of the corporation. These stockholders all reside within the proposed service area, 23 in Norfolk, 4 in Portsmouth, 1 in Newport News, 4 in Franklin, 1 in Churchland, 4 in Smithfield, 4 in Virginia Beach, 2 in London Bridge, 2 in Williamsburg, 2 in Suffolk, 1 in Windsor, 1 in Princess Anne, and 1 in Warwick. The record shows almost without exception that each has substantial business interests and that each is active in local, civic, charitable, educational or other organizations. The record also shows that these stockholders were consulted in the preparation of the local program proposals of Portsmouth and are expected to provide a continuing means of entree to the various organizations of which they are members. There is no showing that they would otherwise participate in the proposed operation of the station, nor can they exercise any degree of stockholder control under the voting trust relative to which findings have previously been made. We therefore see no useful purpose in burdening this decision with findings more detailed than those here made.

PAST PERFORMANCE OF PORTSMOUTH

43. Portsmouth asserts as a point of reliance its record since July of 1953 in the operation of its AM Station WAVY in developing local programs and its past coopera-

tion with local organizations and armed services branches located in the area. It also contends that its ability to produce its proposed local programs is based upon extensive contacts with local sources and upon its experience in presenting programs of a similar nature on its AM station.

44. Upon assumption of control of Station WAVY by the present stockholders, in 1953 its network affiliation was changed and local programming changed. Agricultural weather reports are broadcast five times daily on Saturday and Sunday and six times daily other days. These include frost, storm and drought warnings. Each report is roughly 2½ minutes in length. Monday through Saturday at 6:05 a.m. closing farm market prices for the preceding day at Richmond, Baltimore, Norfolk, New York and Chicago are broadcast. At 12:15 p.m. Monday through Friday and at 12:30 p.m. on Saturday, a 30-minute agricultural program is broadcast which includes agricultural news items, general news items, complete noon market reports from the above-named centers, agricultural weather forecast, farm calendar, and daily features by agricultural experts through the facilities of the Virginia Polytechnic Institute Agricultural Extension Service. County and Extension Service agents of the communities served by the station are invited to participate on this program on a regularly scheduled rotation basis. FFA and 4-H members are also being integrated into this program. Similar local agricultural programs are proposed for the television operation.

45. Local religious programs now broadcast on Station WAVY include a five-minute program, "Morning Prayer", broadcast immediately after sign-on. The program "Morning Devotions" is broadcast Monday through Friday and consists of religious music, a brief prayer, Text or Psalm and a five-minute sermonette. These programs are presented by Clergymen representing the various faiths, denominations and races. The broadcast day is concluded with the program "Evening Prayer." Counterparts of

these programs are included in the proposed television programming all of which will be on a sustaining basis. Station WAVY presently carries some religious programming on a commercial basis, but is in the process of discontinuing this practice through elimination of the programs upon termination of existing contracts. Network religious programs are also presently broadcast and include programs of the Protestant, Catholic and Jewish faiths.

46. WAVY presently broadcasts news programs at regularly scheduled periods throughout the day. These programs are primarily of wire origin. Four programs of sports news and special sporting events are also broadcast daily. In addition to regularly scheduled programs, special sports events are also carried on a local live basis. Similar programs are included in the proposed television operation.

47. Station WAVY has presented special programs regularly to stimulate recruiting in the Armed services and featuring special events of the Armed Services occuring in the region. Such programming was instituted in view of the high concentration of service personnel of all branches in the area. Special Armed Service programs are included in the proposed television operation. The programs presently broadcast include home news for service personnel, the material for which is secured from the various information offices of the service branches located in this area. This daily feature will be a part of the proposed television programming.

48. Network educational programs are now carried on a regularly scheduled basis by WAVY. Portsmouth's exhibit 7 also sets forth a regularly scheduled program termed educational "Teen-Age Book Review" broadcast on Thursday at 2:00 p.m. under the auspices of the Portsmouth Public Library. This exhibit also states that on a weekly basis, WAVY has endeavored to permit all educational institutions and organizations the use of its facilities. Specific programs broadcast were "The Voice of Democracy", featuring the reading of essays on democracy,

and a weekly opera appreciation program. The projected program "Fun With Learning" was cancelled (R 885) and a projected series of local educational programs had not been put into full effect (R 886).

49. Special Marine Weather Reports are broadcast six times daily for the benefit of the marine industries and activities in the area. Such reports are proposed for the television operation in addition to two programs to be devoted to marine topics.

50. Broadcasts of special events occurring within the area have been made, with independent origination of election returns and an address by Secretary of Defense Wilson before the Armed Services Staff College being given as specific examples. Through programs under the direction of Mrs. Alice Brewer White, director of Women's Activities and Public Affairs, broadcast time has been given a large number of local organizations. Similar programs under Mrs. White's direction are proposed for the television operation. A listing of non-commercial spot announcements broadcast during the period of July, 1953 to January 4, 1954 was submitted into evidence. A total of 2,532 such announcements were broadcast during this period. In addition, 21½ hours were devoted during this period to programs primarily on behalf of various governmental and national charitable organizations. The record shows no discussion programs as being carried.

PREPARATION FOR TELEVISION

Beachview

51. Beachview, in the development of its proposed television programming conducted a survey of the area. Mr. Hirschbiel communicated with representatives of the various religious faiths of the area. Mr. Akers assumed responsibility for making contacts with reference to educational programming and discussed such programming with his colleagues at William and Mary and other educators within the area. Mr. Cooper and Mr. Kipnes also

assisted in such contacts. Vernon T. Myers, Paul Hirschbiel, Dudley Cooper and Dr. Akers each made contacts with various individuals and organizations to make arrangements for local entertainment programs. In evolving its agricultural program proposals, Mr. Kipnes and Mr. Hirschbiel held discussions with county agricultural agents and home demonstrators within the area in addition to the farm department heads of Virginia Polytechnic Institute, North Carolina State College and the director of the Virginia Truck Experiment Station. Other organizations consulted in order to determine their interest in proposed programming included members of the Norfolk County Medical Society, South Norfolk Junior Chamber of Commerce, representatives of the Department of Public Safety, Police Department, State Ports Authority, Norfolk Port Authority, Fifth Naval District, Norfolk Jewish Community Council, U. S. Immigration Service and Norfolk Chamber of Commerce. Contacts with representatives of local schools, American Legion Little League Baseball and Cavalier Yacht and Country Club were also made with reference to the proposal of Beachview to carry local sports events. In addition to the 85 personal contacts made, Beachview addressed more than 800 letters to various individuals and organizations in the course of its survey of local needs and the cooperation to be expected from local organizations. Beachview has also established a program advisory board comprised of nineteen residents of the Norfolk area to assist in determining local programming needs. A survey of films available for television programming was also made.

Portsmouth

82. The present owners of Portsmouth acquired Station WAVY with an express purpose of using it as a training ground for television both with respect to staff and programming. At the time of commencement of the hearing proper on January 8, 1954, Portsmouth had operated this

station between five and six months. A farm director, Mr. Herbert W. Ozlin, was employed and special agricultural programming initiated. Religious programming policy was changed to place such programming on a sustaining basis only and religious programs designed to be carried over into television were instituted. A daily program under the direction of Mrs. Alice Brewer White, Director of Women's Activities, was established to feature the activities of local women's and other civic organizations. Special armed service programs and marine programs were initiated. The programming was designed with the objective of being carried over into the proposed television operation. Portsmouth acknowledges that stockholders were brought into its organization for the express purpose of assembling an organization which would include some of the citizens of the area most active in local civic, religious, educational and other organizations (R-907, 966, 1313) and to give representation to the various communities within the proposed service area. Through the extensive civic and other activities of these stockholders it has what it terms "built in" contact with local organizations which it believes will be of assistance in determining on a continuing basis both the needs of the area and in securing the cooperation of such organizations in the production of programming designed to meet those needs. The established contacts of these stockholders were used in the preparation of Portmouth's program proposals. (R-907-913). Prior to exchange of the so-called "McFarland data," on December 24, 1953 Portsmouth had also made 45 contacts with persons other than its own stockholders in the planning of its proposed local programming[29]

[29] Beachview objected to the admissability of Portsmouth Exhibit 24 showing the various contacts made both before and after December 24, 1953 on the ground that those contacts made after finalization of the proposed program schedule were immaterial and that Commission procedures require that each party supply the other party or parties in advance with full information as to the steps taken such as special studies, consultation with local officials, organizations, etc. to ascertain the community needs reflected in the program proposal and the availability of the local programming sources to be used. Counsel for Beachview stated that the objection did not go to those contacts made prior to December 24, 1953. (R-911)

and in assuring the cooperation of local organizations as program sources. Portsmouth has organized advisory committees on religion, health, education, armed services, community services-Government-public affairs, agriculture, and sports. A survey of films available for television programs was also made.

Policies

Beachview

53. Beachview will limit its commercial continuity in participating programs to two 1-minute spot announcements during a 15-minute period. Total commercial time will be limited to 70% as a maximum. If the station were losing money an increase in this maximum would be considered. (R-422, 472, 624) Material accepted for broadcast and its operation generally will conform to the recommendations of the NARTB Television Code. Specific practices with reference to the various types of programming are set forth which reflect to a large extent the provisions of the NARTB Code. Program placement will be made with audience potential in mind in order to serve the audience to which they would normally be expected to have the greatest appeal. Advertising representations and claims will be checked prior to acceptance; advertising will not be accepted on a per inquiry basis. Other specific advertising practices set forth in Beachview's statement of policy are largely those contained in the NARTB Television Code. The station would not engage in editorializing, but would make its facilities available for the presentation of all sides of controversial issues. Religious programs would be carried on a sustaining basis only. A strict policy of film screening prior to broadcast would be maintained.

Portsmouth

54. Portsmouth shows 77.73% total commercial time under its proposed independent operation and 72.78% under the network proposal. A specific percent limitation as to the total amount of time which would be devoted to commercial programs has not been established, but the expected maximum is 75 to 80% which it was testified was regarded as a commitment to the Commission. If the station were losing money at this figure, any increase would be discussed beforehand with the Commission (R-1323, 1331) with the total in no event to exceed 85% (R-1916). Spot announcements will be limited to 1 minute maximum length with no more than three in any 14½ minute period. In the case of announcements of less than 1 minute length, the combined duration of such announcements would not exceed a total of three minutes in any 14½ minute period. The station's policies would conform to the NARTB Television Code and with a station code which carries out the NARTB Code in greater detail. Specific practices with reference to each type of programming are set forth by Portsmouth which reflect to a large extent the provisions of the NARTB Code. Advertising will be refused when there is sufficient reason to doubt the integrity of an organization, the truth of the advertising, or its compliance with applicable legal requirements. Other specific advertising practices set forth in the Portsmouth statement of policy are largely those contained in the NARTB Code. Security measures will be strictly observed in the broadcast of news in view of the importance of the military establishments within the area. The station would not engage in editorializing, but would make its facilities available for the presentation of all sides of controversial issues. Religious programs would be carried on a sustaining basis only.

PROPOSED PROGRAMING

55. Beachview proposes an independent operation that is, it would not be affiliated with a network and asserts this proposal as a point of reliance.

56. Portsmouth proposes a network affiliation with NBC if obtainable, and, in the alternative, an independent operation if a network affiliation is unavailable. NBC presently is affiliated with a UHF channel in the immediate area. Portsmouth presents separate program plans and schedules for each operation. There is, however, no probative evidence in this proceeding that Portsmouth would be able to secure an NBC or other network affiliation. The record shows that each of the major networks now has affiliates in the area involved. While various witnesses for Portsmouth were confident NBC would be willing to change its present affiliation due to the greater coverage expected with the facilities here in contest, no evidence of any form was adduced in support of this belief.

57. We are not here confronted with a situation where the availability of a major network affiliation may be assumed. Rather the evidence shows the contrary. Under such circumstances an applicant proposing such affiliation has the burden of proving by probative evidence that its proposal in this regard can be effectuated. Portsmouth has failed completely to meet this burden. Thus we are in accord with the statement of the Examiner, set forth in paragraph 68 of the Initial Decision, although not for the reasons there stated, that the only proper program comparisons which can be made are of Portsmouth's independent proposal. However, while we believe that consideration cannot be given to Portsmouth's network proposal as a comparative factor which would in any manner favor a grant of its application, we believe any adverse effect resulting therefrom on Portsmouth's local programming must be considered.

58. The applicants propose allocation of program time by types, as follows:

Type	Beachview Percentage	Portsmouth Independent Percentage	Portsmouth Network Percentage
Entertainment	41.07	45.53	36.73
Religious	4.29	4.23	4.30
Agricultural	3.26	1.31	4.15
Educational	8.16	8.93	4.24
News	8.33	6.63	8.21
Discussion	8.68	5.55	5.39
Talks	2.51	27.05	29.35
Marine Reports[3]		1.62	1.69
Defense Service[3]		0.54	0.49

59. The program log analysis of Beachview's program schedule by class reflects the following:

	8 AM 6 PM	6 PM 11 PM	All Other Hours	Total
Recorded Commercial	26.00	37.14	8.31	37.29
Recorded Sustaining	5.16			2.84
Wire Sustaining			5.83	0.61
Live Commercial	39.50	25.11		24.21
Live Sustaining	28.34	30.00	5.83	26.05
Total Commercial	65.50	62.25	8.31	61.50
Total Sustaining	34.50	37.75	11.66	38.50
Complete Total	100.00	100.00	100.00	100.00
Programmed Broadcast Hours	300	150	240	690
No. of Spot Announcements	240	158	264	662
No. of Non-Commercial Spot Announcements	120	61	72	253

[2] Certain programs included by Beachview as discussion do not appear to be within the Commission's description of such programs (i.e. forum, panel and round table programs) and would more properly be classified as talks.

[3] Marine Reports and Defense Service are special programing categories devised by Portsmouth to include programs [illegible] design to meet the [illegible] of the community [illegible]

60. Analyses of Portsmouth's proposed schedules by class are as follows:

	8 AM-6 PM		6 PM-11 PM		All Other		Total	
	Network	Ind.	Network	Ind.	Network	Ind.	Network	Ind.
Network Com.	24.84	—	68.57	—	26.39	—	40.27	—
Network Sus.	11.45	—	2.86	—	0	—	10.79	—
Recorded Com.	2.86	31.27	.71	61.43	34.74	55.00	6.35	43.22
Recorded Sus.	1.49	2.77	1.43	1.43	3.68	5.83	1.76	2.62
Wire Com.	2.85	3.83	2.86	4.76	5.26	10.00	4.51	4.70
Wire Sus.	0	—	0	—	0	10.84	0	1.00
Live Com.	31.06	42.48	8.57	13.81	10.53	5.83	24.65	29.82
Live Sus.	15.71	19.65	15.00	18.57	9.47	12.50	11.67	18.64
Total Com.	65.35	77.57	80.71	80.00	86.84	70.83	72.78	77.73
Total Sus.	34.65	22.43	19.29	20.00	13.16	30.17	27.22	22.27
Complete Tot.		100.00%		100.00%		100.00%		100.00%
Proposed Broadcast Hours	73'10"	102'10"	35'	35'	10'	11'	118'10"	108'10"
No. of Spot Announcements	225	225	125	125	35	35	385	385
No. of Non-Com. Spot Announce.	95	95	60	60	20	20	175	175

Local Religious Programs.

Beachview

61. Beachview proposes five local religious programs: "Let Us Pray" a 5 minute program which will open each broadcast day and be made up of a prayer and recorded hymns; a 15 minute daily devotional program Monday through Friday to be broadcast at 2:45 p.m.; a 5 minute prayer program to close each broadcast day; a 15 minute program at 6:45 p.m. on Saturday giving church news and a list of services for the following Sunday; a 1 hour church service originated in churches selected from members of the Norfolk Ministerial Association; and at 8:30 p.m. on Sunday, the 30 minute program "In the Pastor's Study" which would feature a Protestant Minister, Catholic Priest and Jewish Rabbi answering and discussing questions relating to religion which are submitted by telephone or in writing by viewers. Each of these programs, other than the Sunday church service, would give representation to the various faiths of the area.

Portsmouth

62. Portsmouth would also open its broadcast day with a religious program "Morning Prayer" which would be of 10 minutes duration and consist of a brief "Sermonette" and prayer; the program "Let's Go to Sunday School" would be broadcast each Sunday morning from 10:30 to 11:00 a.m. and would be a remote program covering Sunday School activities; "Let's Go to Church" is a 1 hour program which would immediately follow the program "Let's Go to Sunday School." It is planned that these programs will both originate on a given Sunday from the same church; the program "Evening Prayer" would close each broadcast day and follow the same format as that of the program "Morning Prayer." However, Monday through Saturday this would be only a 5 minute program; "A House of Rock", designed as a daily inspirational program, would be broadcast Monday through Friday from 9:45 to 10:00 a.m. Representation would be given to the various faiths of the area on each of these programs. The programs are proposed on both the network and non-network schedules.

NEWS

Beachview

63. Beachview has classified all its news programs as live, but would utilize wire news in addition to local news. Programs incorporating local, national and international news would be broadcast on Monday through Friday at 11:05 a.m. and 2:00 p.m., at 6:00 p.m. (Monday through Saturday); at 10:30 p.m. (Monday through Friday and Sunday), at 12:20 a.m. (Monday through Saturday), at 11:50 p.m. Sunday, 6:00 p.m. Saturday, 10:30 p.m. Saturday and 10:05 a.m. Sunday. Other programs classified by Portsmouth as news are "Maritime" news Monday through Saturday at 6:30 p.m. featuring news of ship arrivals and departures, general information about tides and other shipping news; "Today's Weather" Monday through Satur-

day at 6:40 p.m., which would be a detailed weather report and forecast; and "Hi School News of the Air" Saturday at 12:30 p.m., which would be a program of high school news featuring students as editors and reporters. Included will be school news of general interest, school sports activities and school musical activities.

Portsmouth

64. Portsmouth classified all its programs incorporating national, international and local news as wire, as each will involve use of some syndicated material. Fifty such programs weekly of two, five or ten minutes duration are shown under the network proposal; 42 of five or ten minutes duration under the independent schedule. On the network schedule these programs would be broadcast Monday through Friday at 7:25 a.m., 7:55 a.m., 8:25 a.m., 8:55 a.m., 4:30 p.m., 6:00 p.m., 11:00 p.m. and 11:45 p.m. (except Friday with one on that day at 12:45 a.m. substituting for the 11:45 program). Saturday programs would be at 9:00 a.m., 4:55 p.m., 6:00 p.m., 11:00 p.m., and 12:45 a.m. Sunday programs would be at 10:00 a.m., 12 noon, 3:00 p.m., 11:00 p.m. and 11:45 p.m. On the independent schedule the news programs would be broadcast Monday through Friday at 9:00 a.m., 3:00 p.m., 6:00 p.m., 9:55 p.m., 11:00 p.m. and 11:45 p.m. (except Friday with one on that day at 12:45 a.m. substituting for the 11:45 program). Saturday programs would be at 9:00 a.m., 4:55 p.m., 6:00 p.m., 11:00 p.m., and 12:45 a.m. Sunday programs would be at 10:00 a.m., 12:00 noon, 3:00 p.m., 6:00 p.m., 9:55 p.m., 11:00 p.m. and 11:45 p.m. Portsmouth also proposes a regular series of agricultural and marine weather reports, 49 weekly, of which 16 would be 3 minute reports, the others 5 minutes under the network schedule; 35 under the independent schedule all of which would be 5 minutes each. As with the news programs, these special weather reports would be spread throughout the broadcast day. These

reports would give storm warnings, frost warnings and any other extraordinary weather conditions both on land and water in order to meet what Portsmouth believes to be a special need of the area due to the extensive agricultural, shipping and water activities located therein. In addition, three programs termed "Special News Programs" will be presented on the independent schedule, two on the network schedule. Those appearing on both are "Tidewater Looks at Washington" to be broadcast on Sunday 12:30 to 1:00 p.m. under the network schedule 6:15 to 6:30 p.m. on the independent schedule and will be made up by Capital Television News reels especially for Portsmouth. This program will cover the activities of area Congressmen, Tidewater visitors to Washington and other Washington activities believed of special interest to the Tidewater area. The program "Tidewater Watches Washington" will be broadcast on both schedules at 6:15 to 6:30 p.m. on Saturday and will be of the same format as the program "Tidewater Looks at Washington." On the independent schedule each Sunday from 12:30 to 1:00 p.m. a program consisting primarily of the week's highlights of the news will be broadcast.

Discussion

Beachview

65. Beachview under discussion programs shows the following programs: "Jay-Cee Forum" a 30 minute program at 9:00 p.m. on Monday, to be produced by the South Norfolk Junior Chamber of Commerce, utilizing a moderator and discussing topics of interest to the state of Virginia and its Tidewater area; "Report from the City Council", a 30 minute program at 9:00 p.m. on Tuesday, on which the mayor and council members would be questioned by the station's news editor on activities of the city council; and "World at Issue" a round-table forum featuring a discussion of important topics in the week's news to be broadcast from 2:30 p.m. to 3:00 p.m. on Sunday. In addition, Beach-

view classified as discussion the following programs:[1] "Tidewater Billboard" a 5 minute program Monday through Saturday at 11:10 a.m. featuring a social calendar of club meetings, civic association gatherings and events in the Tidewater area scheduled for the day of broadcast; "Your Family's Health" a 15 minute program at 12:15 p.m. Monday through Friday featuring a talk on a subject related to health by a doctor specializing in a specific field and on occasions special programs of recognized health agencies; "Harriet Ayre, Home Economist" to be presented by the women's activities director who will present information and news of general interest to the housewife; "Report to Veterans" a 15 minute program at 10:15 p.m. which would present news of veterans, their organization activities and their projects and programs, utilizing on occasions films prepared by the Veterans Administration; "Your United States Navy" a 30 minute program at 7:00 p.m. on Tuesday featuring news and talks on projects under the command of the 5th Naval District; "Your Ports in Action" a 30 minute program at 9:00 p.m. on Wednesday on projects undertaken by the Virginia State Ports Authority, which will include such subjects as the manner in which a ship enters a port, cargo handling, activities of a ship's captain and crew while in port, etc.; "Safety Circus" a 30 minute program at 7:00 p.m. on Thursday which would feature tips on safety and demonstrations of safety precautions for children; "Community Action" a 30 minute program at 7:00 p.m. on Friday which would show the activities and promotions of the Norfolk Chamber of Commerce and talks on historical places in Norfolk and the growth of new sections of the area; "Calling Your Police and Fire Departments" a 30 minute program at 9:00 p.m. on Friday featuring the week's activities of the Norfolk Police and Fire Departments; "Hobbies Unlimited" a 30 minute program at 12:00 p.m. on Saturday featuring organizations and their hobbies, together with

[1] See footnote 22 *supra*.

exhibits; and "Calling Home" a 30 minute program at 12:30 p.m. on Sunday consisting of interviews with 4 servicemen from area military installations and calls home by the selected servicemen.

Portsmouth

66. Portsmouth proposes 3 locally produced discussion programs as follows: "At Your Service" a 30 minute program to be broadcast at 7:00 p.m. Monday through Friday on both the network and independent schedules, the subject matter varying each day; "The People Speak" a 30 minute program at 7:30 p.m. on Sunday on the independent schedule—6:30 p.m. on the network schedule—which would be a round-table discussion of controversial issues of the day; "Comment on Controversy" a 30 minute program at 6:30 p.m. on Saturday on the network schedule and 7:00 p.m. on the independent schedule, which would be similar in scope and format to the program "The People Speak."

TALKS

Beachview

67. Beachview classified as talks only its sports programs. (See paragraph 65 *supra*.) At 6:15 p.m. daily the 15 minute program "Today's Sports" would be broadcast giving a detailed review of the day's sports activities including film to be supplied by the news services; at 10:40 p.m. daily a 5 minute round-up of the day's sports would be given; and on Sunday at 10:15 a.m. a 15 minute program would be broadcast featuring news on hunting, fishing, boating and conservation to be produced in cooperation with local chapters of the Isaac Walton League.

Portsmouth

68. Portsmouth described its talk programs under various headings such as armed services programs, women's programs, children's programs, sports programs and mis-

cellaneous programs. Under armed services programs the following are shown: "Saclant Special" a 15 minute program at 4:45 p.m. Monday through Friday on the network schedule and a 30 minute program at 4:30 p.m. on the independent schedule, designed to help integrate newly arrived military personnel into the community; the "Sail Loft" a 30 minute program at 3:30 p.m. on the network schedule—4:00 p.m. on the independent schedule which would utilize remote equipment featuring Navy activity within the area; and "Defense Sign-Off" a 5 minute sign-off program on both schedules designed to promote recruiting for the armed services. Under women's programs the following are shown: "Magic Circle Food Shopper" a 30 minute program Monday through Friday on the independent schedule only which would feature the purchases in foods available within the area; "Magic Circle Best Buys" a 30 minute program Monday through Friday at 10:00 a.m. on the independent schedule only which would feature merchandise available in the local markets other than food; "Magic Circle Shopper" a 30 minute program Monday through Friday on the network schedule only which would be a combination of the two previously described programs; "Daily Does It" a 15 minute program Monday through Friday at 9:30 a.m. on the network schedule, 10:30 a.m. on the independent schedule, which would feature physical education; "Rachel's Kitchen" a 30 minute program at 2:30 p.m. Monday, Wednesday and Friday on both schedules featuring so-called "Virginia Cooking"; "Man in the Kitchen" a 30 minute program at 2:30 p.m. Tuesday and Thursday on both schedules which would be similar to the previous program except that a male chef would be featured; "Wedding Reprise" a 30 minute program at 2:00 p.m. Monday on both schedules which would feature the exhibit of wedding gowns, etc.; "Sew it Goes" a 30 minute program at 2:00 p.m. Tuesday on each schedule giving sewing instructions; "The Lady Looks at the Men" a 30 minute program at 2:00 p.m. Wednesday on

both schedules featuring interviews with outstanding men of the community; "Let's Have a Party" a 30 minute program at 2:00 p.m. Thursday on both schedules featuring table settings, entertainment, ideas and games; "Garden Trails" a 15 minute program at 6:30 p.m. Thursday on the independent schedule only, featuring garden information; and "The Title in Fashion" a 30 minute program at 2:00 p.m. Friday on both schedules featuring women's fashions. Under children's programs Portsmouth shows the program "Enchanted Cottage" a 15 minute program at 5:00 p.m. on the network schedule, a 30 minute program at 5:00 p.m. on the independent schedule, Monday through Friday, featuring subjects of interest to children with selected children appearing on the program. Sports programs would be as follows: a 15 minute program at 6:15 p.m. Monday through Friday on both schedules giving a round up of sports news and featuring a different sport each day; "Tee to Cup" a 15 minute program at 6:30 p.m. Wednesday on both schedules featuring golf instruction; "Final Tally" a 5 minute program on Saturday at 4:45 p.m. on the independent schedule, a 25 minute program at 4:30 p.m. on the network schedule, giving a weekly round-up of sports; "Sports of the Season" a 2 hour program at 8:00 p.m. Monday through Saturday on the independent schedule only, featuring sports films; "The Top of the Week" a 2 hour program at 8:00 p.m. Sunday on the independent schedule only, featuring sports films; "Sports of the Season" a 2½ hour program at 2:30 p.m. on Saturday on the independent schedule only, featuring either a local sports event by remote facilities or film re-creation of sporting events. Under miscellaneous programs Portsmouth shows the following: "VIP Virginia" a 15 minute program at 6:30 p.m. Monday and Thursday on the net-

* Beasley in the hearing proceeding questioned the availability of adequate sports film to provide two hours of programming per day. We believe the survey of Portsmouth of film availabilities adequate to establish such availability, particularly in view of the subject matter involved.

work schedule and on Monday only on the independent schedule, featuring interviews of important local citizens; "Ship and Ports" a 30 minute program at 6:30 p.m. Friday on both schedules, featuring local marine activities such as ships' arrival; "Men and Ships" a 15 minute program at 9:45 a.m. Saturday on both schedules featuring local marine activities; and "Tidewater Looks at Government" a 30 minute program at 5:00 p.m. Saturday on both schedules featuring talks on a rotation basis by the city manager or mayor of the various communities within the area.

AGRICULTURAL

Beachview

69. Beachview proposes the following programs: "Tidewater Farm and Home Hour" a 30 minute program at 12:30 p.m. Monday through Friday, which would present farm and market reports, interviews with agricultural specialists, and new farm techniques and machinery; "Stock and Crop Aids" a 15 minute program at 6:45 p.m. which would feature closing crop, stock and market quotations, and an agricultural weather forecast; "Tidewater Farm and Home Hour" a 1 hour program on Saturday featuring agricultural news of the week, discussions on farming, 4-H Club activities and other agricultural subjects; and "Report to the Farmer" a 15 minute program at 6:30 p.m. Sunday featuring an agricultural weather forecast and a round-up of the weekend farm news and reports.

Portsmouth

70. Portsmouth, in addition to the agricultural and marine weather reports previously described under News, proposes the following local agricultural programs: "WAVY-TV Farm Bureau" a 30 minute program Monday through Friday at 12:30 p.m. and a 1 hour program on Saturday at 12:00 p.m. on both schedules which would feature farm news, stock and market quotations, and agri-

cultural weather forecasts, and on Saturdays a locally produced film or remote demonstrating farm techniques and developments. For the Saturday program the farm owned by Portsmouth's farm director or one owned by one of its stockholders would be utilized for demonstrations and experiment projects.

EDUCATIONAL

Beachview

71. Under educational programs Beachview shows the following programs: "Little Red School House of the Air" a 30 minute program at 11:30 a.m. Monday through Friday produced in cooperation with Norfolk City and Norfolk County schools and featuring demonstrations in classroom techniques and teaching methods, the program being designed for in-school viewing; "Professor Speaks" a 30 minute program at 4:00 p.m. Monday through Friday presented in cooperation with the College of William and Mary and designed for the purpose of giving college credits upon the payment of a tuition fee to the college and taking a final examination; "What in the World" a 30 minute program at 7:00 p.m. Monday featuring a quiz on a competitive basis between students of 2 different schools; "Careers Unlimited" a 30 minute program at 7:00 p.m. Wednesday featuring a panel of high school seniors talking to a representative of a profession or industry concerning his career; "Dramatic Workshop of the Air" a 1 hour program at 8:00 p.m. Saturday featuring a dramatic presentation by the drama department of the College of William and Mary; "Festival of Music" a 30 minute program at 3:00 p.m. Sunday featuring a choral group of Booker T. Washington High School of Norfolk; "Sunday Merry-Go-Round" a 1½ hour program at 4:00 p.m. Sunday termed of the "Omnibus type" and featuring museum items, one-act plays by school dramatic clubs, interviews with wives of naval personnel, and book reviews and vari-

ous forms of entertainment such as songs, ballet dances and instrument music.

Portsmouth

72. Under educational programs Portsmouth shows the following: "Education at Home" a 30 minute program at 1:30 p.m. Monday through Friday on both schedules and covering subject matter such as book reviews, debates, fine arts and crafts, health, music, choral work and history and science workshop; "Adult Education Series" a 30 minute program at 1:00 p.m. Saturday on both schedules to be broadcast in conjunction with William and Mary College, Virginia Polytechnic Institute and the Adult Educational Center which would feature subjects from Opera Workshop and series of lectures on various subjects; "Davy Crockett" a 30 minute program at 9:15 a.m. Saturday on both schedules to be presented in conjunction with the Portsmouth Public Library and featuring discussions of American life and books available on this subject in the public libraries, together with film on this subject; "The World We Live In" a 15 minute program at 10:15 a.m. Sunday on both schedules to be presented in conjunction with the Norfolk Public Library and covering the various sciences; "One Man's Show" a 30 minute program at 2:00 p.m. Sunday on the network schedule—at 4:30 p.m. on the independent schedule—to be presented in conjunction with the Norfolk Museum of Fine Arts and featuring exhibits on various subjects.

ENTERTAINMENT

Beachview

73. Without entailing the length or time of each program, Beachview proposes the following local entertainment programs: "Hi Neighbor" an audience participation variety program; "Miss Ruth Anne's Kindergarten" featuring children in unrehearsed play and work; "Bill Willse's

Emporium" featuring popular music for teen-agers; "8-0 Club" an audience participation variety program; "Moonlight Sonata" featuring the piano, light conversation and poetry recitation; "Hollywood Reporter" featuring news of Hollywood stars and motion pictures; "Music of the Masters" a weekly television concert to be presented by the Feldman Chamber Music Society; "Play It and Name It" a charades program; "Charm School" featuring women's fashions; "Is It a Hit?" featuring recordings for teen-agers; "Hayloft Jamboree" a folk and popular music program; "Mr. and Mrs. Fix-it" demonstrating "how to do things around the house and apartment"; "Amateur Hour" which is self-descriptive; and "Studio 10" which would include dramatic readings in addition to stories and plays to be presented by local artists.

Portsmouth

74. Portsmouth proposes the following entertainment programs on both schedules: "Sunday Comics" which is self-descriptive; "Virginia Clam Bake" which would feature folk and western music; "Greener Pastures" a musical program presenting local talent; "By Candle Light" which would feature semi-classical and classical music; "Vacation Caravan" featuring vacation resorts and opportunities; and "Audition for Fame" a local talent competition program.

75. Each applicant proposes to broadcast locally originated film programs to be secured from distributors. As previously found, both made a survey of film availabilities. Portsmouth in addition, as shown in paragraph 64, *supra*, would have certain films produced specifically for its proposed station. In this area of programming, a licensee exercises no control except in cases such as is incorporated in Portsmouth's proposal, over the production of the films available for television programming. The Commission has therefore consistently refused to accept as a fact that

a specific film or series of films would be broadcast as there can be no assurance that such film or series of films would be available to a grantee at the time of commencement of operation or would even still be in production. We have however, accepted the proposals of applicants relative to films as demonstrating the type of programs which would be carried (that is various type of film programs such as western movies, mystery programs, sports film, news film, programs of governmental agencies known to make such films available, etc.) Film programs produced by a licensee for use over its own station, of course, would be classified as live. From our knowledge of the industry, such position is well-founded as individual film availabilities are affected by private contractual rights and the exigencies of the market not under the control of an applicant. Overall however, though a particular film or series of films may not be available at the time of grant to an applicant, types of film such as those shown above would be available from various sources. Beachview, in its proposal listed the names of specific films or series of film programs which, by its survey prior to the commencement of the hearing, were shown then to be available. Portsmouth listed film programs in its proposed schedule by type. Beachview proposes a total of 45 film programs, of which 41 would be entertainment, 1 news, 2 talks (sports), and one listed as discussion. Among these are a number of children's programs. The program listed as discussion is a weekly news reel edited specifically for young people. Under its network proposal, Portsmouth's film programming would be limited principally to Saturday. Such programming would be largely entertainment except for the previously discussed news programs, "Defense Sign Off" and the programs "Ships and Ports" and "Men and Ships." On the independent schedule all film programming which is shown on the network schedule, with extensive additional film programming, would be included (which would include entertainment, talk and news

programs, extensive time being devoted to sports programs). A total of 53 film programs would be broadcast on the independent schedule, 21 on the network schedule. Thus in this area, there is no basis for comparative superiority.

76. We believe that we should here dispose of certain findings of the Examiner relative to the proposed programming of Portsmouth. At paragraph 94 of the Initial Decision it is stated that "There is no indication in the record that any stockholder or director planned any specific program. Portsmouth did not produce a single witness who was intimately conversant with program content." In footnote 22 at page 34 of the Initial Decision it is stated:

> In this connection reference is again made to the fact that a former employee was responsible for the program exhibits. Portsmouth's chief program witness, Burkland, was at a serious disadvantage in attempting to testify concerning them. There is no doubt but that Burkland's testimony was honest and was the best he was capable of giving at the time, but it was very often not responsive and frequently consisted in generalizations where specific factual answers should have been at his command. The only conclusion that can be drawn is that he had no recognizable part in the actual construction of the programs.

In paragraph 76 of the Initial Decision the Examiner found as follows:

> Each applicant alleges that its (local) programs will be "distinctive." Beachview's witnesses were not questioned as to the meaning of this term in relation to its programs, but Portsmouth's witnesses were examined by Beachview's counsel with negative results for Portsmouth. Portsmouth's witnesses either could find no application for the term to their programs or didn't know what the term meant as descrip-

tive of the programs. In this connection, as well as in other testimonial respects concerning programs and policies, Portsmouth was at a decided disadvantage because the author of a number of exhibits which would normally be of the utmost significance was at the time of the hearing, no longer employed by Portsmouth and the witnesses (chiefly Burkland) who attempted to testify concerning exhibits which had not been prepared by them or under their direction were, in many respects, woefully unfamiliar with the contents of the exhibits and unable to interpret them.

In footnote 16 at page 28 of the decision it is stated:

> There is no need to go into the employment disagreement which terminated in this unfortunate result. Nor is any reflection meant against the witnesses who valiantly tried to "carry on." The situation is mentioned only because of the almost impossible task of trying to determine what is probative, for example, in the major areas of Burkland's testimony.

Yet at paragraph 92 of the Initial Decision the Examiner states:

> The applicants' programs shown above constitute wide samplings for decisional purposes. As previously mentioned, if taken at face value neither applicant's programs show even a modicum of superiority over the other's with the possible exception that Portsmouth's agricultural programs may be superior to Beachview's [1] whereas Beachview's "Miss Anne's Kindergarten" deserves a token of merit as the only show of production-proved quality in the entire proceeding. Since no overall superiority of programs, *per se*, is demonstrable from the record, that part of Beachview's point of reliance 5 (fourth paragraph) dealing with "a new and distinctive local program

service" and Portsmouth's point II, paragraphs 1, 2, and 3 must fail.

Footnote 21 at page 33 states:

> This observation is made, not so much on the basis of what the program description shows, as on the basis of the intelligent testimony of Mr. Luter. (A Portsmouth witness)

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77. We have carefully reviewed the record in this proceeding and the testimony of each witness. The witnesses of Portsmouth were put to vigorous cross-examination and the rise of antagonism between counsel and witnesses and the contest between counsel for the respective applicants is apparent. At points a witness became confused as to interpretation of policy statements or took issue with counsel. Examples are to be found at pages 1042-1048, 1211, 1315, 1320, 1502, 1818, 1828, 1893. The basis for Portsmouth's belief that its programming proposal is distinctive does appear in the record and the evidence shows that such belief was asserted on the grounds that similar programs are not broadcast by other stations, or the manner or time of presentation would be distinctive or that the content was distinctive. From our review, we do not find that the record sustains the findings of the Examiner that "there is no indication in the record that any stockholder or director of Portsmouth planned any specific program and that Portsmouth did not produce a single witness who was intimately conversant with program content." Although confusion as to policy statements is present, the witnesses were generally familiar with the proposals, had seen and approved them and admitted in some cases that they did not believe they met their full expectations in certain respects, but would be improved in the future. The testimony of Mr. Burkland under whose supervision the programming proposal of Portsmouth was prepared demonstrates that he was thoroughly conversant

with the proposals although he was not the actual word-for-word draftsman. We are therefore unable to accept the Examiner's finding in this regard. As to the contention of each applicant that its programs are distinctive—the local programs of each were tailored to its particular proposal and to the area to be served utilizing programming sources available within the area and production techniques generally utilized in the industry. Thus, we fail to see any importance in the fact that Beachview's witnesses were not questioned as to the meaning of this term in relation to its programs or whether Portsmouth's witnesses stated with preciseness what the term meant as descriptive of its programs. Further, these findings of the Examiner contravene his conclusions quoted *supra*, as to the program proposals of the applicants.

STUDIOS

78. Neither applicant asserted as a factor favoring grant of its application its proposed studios. Beachview's would be located on the east side of Hampton Boulevard within the city of Norfolk and are to be leased from Bendix Corporation together with the transmitter building. Portsmouth's studios would be located at Faugnier Avenue and South Street within the city of Portsmouth. Both locations would be in compliance with the requirements of the Commission's Rules.

STAFF

Beachview

79. Beachview proposes a staff of 130 persons, 59 in the Program Department, 11 in the Administrative Department, 55 in the Technical Department and 5 in the Commercial Department. Dudley Cooper would act as General Manager, Irvin M. Kipnes as Assistant General Manager, Francis V. Guidice as Production Manager and Ruth Anne Flaherty as Director of Women's and Children's Activities. Findings as to their experience have previously been made.

Other proposed staff members are Ben Wahrman as Director of Public Affairs, Bill Cooper and Bill Willse in capacities termed "staff personalities" and Bill Flaherty as Senior Producer-Director. One Art Rollins is proposed as a free lance producer for the station. Mr. Wahrman has had experience in newspaper and publicity work, has written and produced several television shows, has appeared on television shows and conducted a radio program. Mr. Cooper has had extensive training and experience in music and has appeared on both radio and television programs. Mr. Willse has handled publicity for several music artists and has had extensive experience as a radio "disc jockey" and master of ceremonies. Mr. Flaherty has had experience with Stations WMAL-TV and KCRI-TV in production capacities. Mr. Rollins has had extensive experience in the theatre. Qualified personnel will be employed to fill the other positions. Beachview also introduced into evidence a staff personnel assignment chart, job descriptions and definite personnel assignment schedules which demonstrate that staff positions and assignments have been correlated with its program proposal.

Portsmouth

80. Portsmouth proposes a staff of 86 persons, 39 in the Program Department, 7 in the Administrative Department, 32 in the Technical Department and 8 in the Sales Department. Hunter C. Phelan would devote his full time to the duties of president and is shown under the Administrative Department. Carl J. Burkland would act as General Manager. Findings as to their experience have previously been made. Other proposed staff members are Howard Stanley as Sales Manager, William L. Tonkin, Jr. as Television Accountant, Alice Brewer White as Television Woman's Editor, Herbert W. Ozlin as Farm Director, Francis J. Facenda as Operations Director, Helene A. Little as a continuity writer, and Ruth Pond Parker as Traffic Manager. These individuals are all presently em-

ployees of Portsmouth in its AM operation. Mr. Stanley has been in broadcast work since 1938 with his experience encompassing almost all phases of non-technical operation. He has also held responsible positions with the Columbia Broadcasting System network. Mr. Tonkin is an experienced accountant. Miss White has been in newspaper and radio work since 1933 and has had extensive experience in both radio and television as director of women's programs. Her work has encompassed writing, producing, directing and appearing on both radio and television programs. Mr. Ozlin majored in agriculture at Virginia Polytechnic Institute, has had a number of years agricultural experience both as operator of a farm and as county agricultural agent, and since September of 1953 has been associated with Station WAVY in its agricultural programming. Mr. Facenda has been in broadcast work since 1939 and has had extensive experience in announcing, radio writing, program production and as program director. Mrs. Little has experience as head of the continuity department of Station WGH and for the past seven years has been continuity director of Station WAVY. Mrs. Parker has been traffic manager of Station WAVY for the past four years. Qualified personnel will be employed to fill the other positions. Portsmouth also introduced into evidence job descriptions, work assignment schedules and manning tables which demonstrate that staff positions and assignments have been correlated with its program proposal. In this connection Beachview by relating Portsmouth's program schedule to its work assignment schedule points out alleged deficiencies in Portsmouth's staffing proposal: e.g., only one engineer on duty at the transmitter, only 4 director-producers alleged to be an inadequate number, failure to show cameramen on duty after 8:30 p.m. on Sundays despite later five shows (weather reports and sign off), and a number of other periods at which personnel shown as on duty are believed by Beachview to be insufficient to adequately handle the equipment necessary to produce a satisfactory program.

Equipment

Beachview

81. Beachview proposes five camera chains, three field and two studio and two film cameras together with associated equipment. Remote equipment would also be purchased together with additional studio equipment which it would serve no useful purpose to itemize.

Portsmouth

82. Portsmouth proposes four camera chains, two field and two studio and one film camera together with associated equipment.[*] Remote equipment would also be provided together with other studio equipment which, as with Beachview, it would serve no useful purpose to itemize.[**]

Broadcast Facilities

83. In the so-called "Tidewater Area" at the time of the hearing there were eight standard broadcast stations, 3 FM stations and 4 television stations in operation as follows:

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[*] Beachview's point of reliance on equipment relates specifically only to the difference in numbers of cameras.

[**] Portsmouth did not in the exchange of exhibits list certain minor items of equipment on hand and in use in its present AM operation such as recording units, amplifiers and microphone booms. The Examiner therefore granted a motion to strike that part of Portsmouth Exhibit 18 listing these items of equipment to which Portsmouth did not except. Beachview now contends in its exceptions that it should be found that Portsmouth has failed to provide for "such basic equipment as a tape recorder to handle such programs as 'Morning Prayer' and 'Evening Prayer' which may be taped; and that provision is made for only one microphone boom, inadequate for two studios as well as remote operations." An applicant is not required to furnish a detailed listing of equipment in an application, but rather the funds allocated for the major components (land, buildings, transmitter, antenna system, monitors, studio equipment, other items) costs shown to be the costs in place and ready for service. In comparative proceedings the listing or failure to list incidental items of equipment is of no importance where adequate funds have been allocated to cover such items. Consequently, the admission or exclusion of this evidence is immaterial and the exceptions of Beachview will therefore be denied.

AM	
WNOR, Norfolk	1230kc, 250 w, U
WRAP, Norfolk	850kc, 1kw DA-2, U
WTAR, Norfolk	790kc, 5kw DA-N, U
WGH, Newport News	1310kc, 5kw DA-1, U
WACH, Newport News	1270kc, 1kw, D
WAVY, Portsmouth	1350kc, 5kw DA-2, U
WLOW, Portsmouth	1400kc, 250 w, U
WVEC, Hampton	1490kc, 250 w, U

FM	TV
WTAR-FM	WTAR-TV
WRVC-FM	WTOV-TV
WGH-FM	WACH-TV
	WVEC-TV

The licensees or permittees of the four television stations also hold AM permits, one WTAR Radio Corporation, also holds an FM permit.

CONCLUSIONS

1. By our Order of December 9, 1958, designating the above-entitled applications for hearing and Order of March 26, 1954 deleting issue 6, we found Beachview Broadcasting Corporation and Portsmouth Radio Corporation legally, technically and financially qualified to construct, own and operate a television broadcast station. In the event, however, of grant of the application of Portsmouth Radio Corporation we further found that, in view of the proposed antenna height of 1,000 feet above average terrain, such grant should be subject to the condition "That the obstruction markings shall be in accordance with such hazard markings as the Commission may find necessary and appropriate."

2. The standard comparative issue governed the conduct of the proceeding held herein as restricted somewhat by the points of reliance advanced by the several parties and

incorporated and made a part of this decision by reference in our findings. The facts of record establish that, on the basis of the proposed policies, program service, staffing, management and operational proposals, a grant of either application herein would be in the public interest. Having found that each applicant possesses the qualifications to operate a station in the public interest, the hearing held on the comparative issue pursuant to the order of designation requires us now to select the better qualified applicant on the basis of significant differences in the specified areas of comparison.

3. Because of the circumstances of this case and the matters asserted by each party in derogation of the character qualifications of the other, we believe certain preliminary statements to be appropriate. The Commission must be guided by certain factors in the decision of adjudicatory proceedings, but the weight given to any or all is measurable only upon consideration of the condition before it in an actual hearing case. Thus, a past record may be the most demonstrable proof that a proposal will be effectuated in one case, in another the residence factor may outweigh such superiority. *Westinghouse Radio Stations, Inc.* 10 RR 878. Again conduct may play the dominant role, notwithstanding an apparent superiority in what the Commission generally considers to be the important guide factors. *Radio Fort Wayne, Inc.* 9 RR 1221. The exercise of quasi-judicial discretion by an administrative agency must be upon the facts and law of the case in which the discretion is invoked. Cf *Biscayne Television Corporation et al.* 11 RR 1113. With these preliminary remarks we turn first to those factors generally considered to be the significant guide factors which have been urged by the parties, each in its own behalf, as a substantial point of preference demonstrating that a grant of its application will better serve the public interest than would a grant of the application of its adversary.

Local Residence

4. Each applicant asserts the local residence of its officers, directors and stockholders as a factor favoring its proposal. Beachview emphasizes the Norfolk residence of its principals in which its studios would be located as contrasted to the Portsmouth residence of its opponent's principles[*] in which the latter's studios would be located. Portsmouth's claim is predicated on the long term, local residence of all stockholders, their prominence and particularly on the representation given the various communities located within the area to be served. The facility here in contest is a combination assignment to what is frequently termed "hyphenated communities." Beachview, under its philosophy, would have us award a preference on the basis of considering only that community in which an applicant elects to locate its principal studios. In contrast, Portsmouth urges the entire service area philosophy, not only as to the particular communities to which the assignment was made, but also as to other communities within the area. Subject to the limitations set forth therein, our decision in *Appalachian Broadcasting Corporation*, 11 RR 1327 resolves this contention in favor of Portsmouth.

5. In the case of Beachview's 8 stockholders two, Francis F. Guidice and Ruth Anne Flaherty are non-residents of the area and have never lived there. Another, Irving N. Kipnes, has only recently moved to the area, although he previously resided in Norfolk for a short period. He is presently a resident of Virginia Beach. The other five have been residents of Norfolk for many years.

6. The 61 stockholders of Portsmouth reside in the following communities: Norfolk 27, Portsmouth 6, Newport News 2, Franklin 5, Churchland 2, Smithfield 5, Virginia Beach 5, London Bridge 2, Williamsburg 2, Suffolk 2,

[*] In this point of reliance as in others, Beachview contends that the Commission can give consideration only to the 11 voting trustees of Portsmouth.

Windsor 1, Princess Anne 1, Warwick 1. The 11 Portsmouth voting trustees reside in the following communities: Norfolk 4, Portsmouth 2, Franklin 1, Churchland 1, Newport News 1, Smithfield 1, Virginia Beach 1. With one exception, Mr. Burkland, the Portsmouth stockholders and trustees have resided in their present communities for many years, many all their lives. Each has attained prominence in his community through local activities.

7. Thus, under the factual situation here present, in Portsmouth we have an applicant showing 100% local residence not only of its voting trustees, but also of all nonvoting stockholders. In Beachview the residence showing is strong, in our judgment strong enough to make the percentage difference between the applicants of no special significance. We therefore conclude that on the factor of local residence Portsmouth has not sustained its point of reliance.

Civic Activities

8. Each applicant asserts the civic connections of its principals as a factor favoring grant of its application. As with local residence, Beachview emphasizes the Norfolk civic connections of its principals as contrasted to the Portsmouth civic connections of its opponent's principals. Portsmouth urges the civic backgrounds of its principals in the entire service area. As with the factor of local residence, we cannot award a preference on the basis of considering only that community in which an applicant elects to locate its principal studios. Detailed findings as to the civic activities of the principals of each applicant have been made. These show that Dudley Cooper, Vernon T. Myers, Paul O. Hirschbiel, Dr. William Gerald Akers, and Mr. John R. Roughton have each made substantial contributions to civic, charitable and other causes principally in the city of Norfolk. Mr. Kipnes shows limited activity in Norfolk with the other stockholders of Beachview having

no local civic connections. Each of the trustees of Portsmouth shows substantial contributions to civic, charitable and other causes with their activities showing assumption of responsibilities in such causes of the highest order. We believe Portsmouth makes the superior showing relative to civic activities considering solely its voting trustees and should have a greater awareness of the needs of local organizations within the area to be served through the civic connections of these trustees. In addition there are the extensive civic connections of its non-voting stockholders which Portsmouth does propose to utilize in projecting station programming. We therefore conclude that Portsmouth has sustained its point of reliance with respect to participation in civic affairs.

Past Performance of Station WAVY

9. Portsmouth asserts that the Commission can have greater confidence in the ability of WAVY to carry out its commitments on the basis of its record of operation and developing local programs, cooperating with non-profit organizations in the area and cooperating with the armed services in the presentation of programs. Beachview, of course, has no past broadcast record.

10. We have made detailed findings of such performance and will here point up only certain specifics. Its agricultural programming record has been good. In its religious programming the policy represented, of discontinuing all commercial programs, has been brought into operation. Special attention has been given to the special maritime and armed services needs of the Community. Special events have been broadcast with its record in the broadcasting of non-commercial spot announcements on behalf of local and national organizations being good. Efforts have been made to carry local educational programs with some success. Its record on discussion programs is weak.

11. As shown in our findings, certain of the programs were projected to test insofar as possible their suitability for television; they would be carried over into the television operation. Overall, particularly in view of the short period of time of operation of Station WAVY by the present stockholders, its record of performance has been good and tends to supply assurance of the likelihood that Portsmouth would effectuate its television proposals. Accordingly Portsmouth has sustained this point of reliance and is accorded a preference on it, Beachview having no past record before this Commission as a licensee. This preference, however, is not of great force in light of the brief period covered by such record (and recent acquisition thereof). We recognize the difference in our conclusions here and those of the Examiner who made no findings on Portsmouth's past record stating "No basic historical facts of even slight consequence tending to support the point of reliance were established by exhibit or testimony." In view of the evidence of record on this point and the relevance in a comparative proceeding of the past record of a licensee, whatever its nature, we cannot adopt the position of the Examiner, though we have given the shortness of Portsmouth's performance record consideration in the weight we are attaching to the showing made.

Broadcast Experience

12. Beachview asserts the broadcast experience of its principals as a factor favoring grant of its application. The experience of each principal of the applicants is fully detailed in our findings. In the case of Beachview, Mr. Cooper, a substantial stockholder, director and the proposed general manager of the station, shows no previous broadcast experience. Mr. Kipnes, the assistant general manager-commercial manager, and a director and substantial stockholder, shows some three years of experience in the operation of radio stations as general manager of Stations WCAV and WDEM and commercial manager of

WSID. He has had some less direct experience in television. Dr. William Gerald Akers, vice-president, a director and holder of a .27% stock interest also has indirect experience in television, but none in the actual operation of a station. Francis V. Guidice, who holds a .67% stock interest and is a director of the corporation, would be production manager of the station. He shows considerable experience in both the technical and programming phases of television. Ruth Anne Flaherty who holds a .42% stock interest and is a director, would be director of women's and children's programs. She shows television experience in the writing and producing of programs.

13. In the case of the Portsmouth applicant, Carl J. Burkland, the proposed general manager of its station, who is a stockholder, a director, officer, and trustee, shows extensive experience in responsible positions over a long period of years. His experience includes positions as announcer, salesman, sales manager, and for more than five years the general managership of the Clear Channel Station WTOP. In this position he was responsible for overall operation of the station, carrying out of station policy and maintaining community contacts. Since July of 1953 he has been general manager of Station WAVY, located in the area to which the channel assignment here contested is assigned. In addition Mr. Burkland has held positions of responsibility over a period of years with the Columbia Broadcasting System in sales work and station administration. None of the other trustees of Portsmouth have previous broadcast experience. We believe that from the management standpoint, Portsmouth makes the stronger showing in this respect in view of the extensive experience of its general manager, Mr. Burkland as contrasted to the complete lack of broadcast experience in the general manager and much more limited experience of the assistant general manager-commercial manager of Beachview. Somewhat offsetting this superiority of Portsmouth are certain experience specialties of Beachview's minor stockholders

and directors as above recounted. Giving due consideration to each of the above factors we conclude that the broadcast experience shown by Beachview falls short of that shown by Portsmouth. Beachview has therefore failed to sustain this point of reliance.

Backgrounds of Stockholders

14. Beachview asserts as a point of superiority that the backgrounds of its stockholders are more varied and better designed to insure an effective television operation in the public interest as contrasted to those of the voting trustees of Portsmouth. In support of this assertion, its point of reliance 8 (see Appendix A) lists the combined types of experience in various fields. The record shows Mr. Cooper's interests to be in optometry, amusement parks, rental properties and retail jewelry, all in ownership-management capacities. We have made detailed findings of the violations of law occurring at the amusement parks while under his management and the matters asserted relative to Tanhen Company, Inc. and believe that they do not reflect adversely on Mr. Cooper's background. The record shows the background of Vernon T. Myers to be in building construction, that of Mr. Hirschbiel to be in banking, that of Mr. Akers to be in college instruction, that of Mr. Roughton to be in the retail automobile and real estate fields, that of Mr. Guidice to be in Government, maritime service and broadcast work, and that of Mrs. Flaherty to be in elementary school instruction, social work and television program production. Mr. Kipnes' background relates primarily to radio with some experience shown in advertising and reporting. He also organized, was president and 50% stockholder of a real estate firm, a financially unsuccessful venture. His background in radio also includes the matters of record shown in paragraph 16 of our findings and footnote thereto. In this connection, the testimony of Mr. Schwartz stands uncontradicted. The Examiner found the department and testimony of Mr. Schwartz "persua-

sive of his desire to testify only to what he considered the facts and not to conjecture or indulge his imagination." He also found that Mr. Schwartz "was obviously a neutral witness." We therefore see no alternative to accepting this testimony, not as establishing that Mr. Kipnes did have an actual offer by the Communist Party to purchase his stock in Cavalier or that he was negotiating with it to purchase his shares, but as establishing that he informed Cavalier that he had such an offer and utilized the threat of accepting such offer in his efforts to force Cavalier to purchase his stock.

15. The backgrounds of the trustees of Portsmouth show the following fields: Mr. Phelan in the food business, banking, and Federal regulation of the food business; Mr. Bufkland entirely in broadcast work; Mr. McLean in building, contracting and materials, in addition to his position as chairman of the Portsmouth Redevelopment and Housing Authority for more than twelve years; Mr. Hofheimer in a large number of business fields including banking, railroad, building material, sand and gravel, coal, and oil; Mr. R. D. Cooke in law and city political offices; Mr. Gresham in building contracting, public utility, banking and insurance; Mr. Aspinwall in warehousing; Mr. Camp in the manufacture and sale of pulp, paper and lumber, railroad, concrete products and banking; Mr. Luter in meat packing and banking; Mr. Hutchens in retail automobile and appliance sales, toy manufacture, garments, and banking; and Mr. Hardy as owner and operator of farming properties.

16. Under these facts, it is apparent that the backgrounds of the principals of Beachview are less varied than are those of the principals of Portsmouth; and to this extent Beachview's reliance point fails. Nor do we believe that the record establishes that the backgrounds of Beachview's stockholders are such as to warrant a conclusion that they are better designed to insure an effective television operation in the public interest. Here we particularly note the

evidence of irresponsible conduct regarding Mr. Kipnes, who has taken a prominent part in this applicant and would have important responsibilities in its future operations. We are aware of Beachview's contention that the matters relative to Mr. Kipnes' conduct cannot properly be considered under this point of reliance. We do not agree with this contention. The evidence being relevant to the point asserted, its consideration is proper. Further, the issues specified when we designated the applications for consolidated hearing require its consideration. The Commission cannot be foreclosed from weighing in the public interest matters appropriately placed in the record, but not expressly plead affirmatively by the applicant which would benefit from consideration of such matters. A proceeding such as this is not solely a private contest between applicants; the public interest also is involved. *California Inland Broadcasting Company*, 11 RR 257 footnote 19.

Integration of Ownership and Management

17. Beachview asserts as a point of superiority the fact that virtually all its principals have been integrated into the day-to-day operation of its proposed facility. The facts of record disclose that Dudley Cooper, Irvin M. Kipnes, Francis V. Guidice and Ruth Anne Flaherty would devote their full time to the proposed operation. These individuals hold a total of 88.89% of the outstanding stock in addition to being officers and or director, and would occupy the following positions respectively: general manager, assistant general manager-commercial manager, production manager, and director of women's and children's activities. In addition each of the other stockholders Myers, Hirschbiel, Akers and Roughton would devote respectively 24, 24, 19 and 24 hours weekly to the proposed operation. We are here aware of the matters of record concerning the time Mr. Hirschbiel will be able to devote to the proposed operation and the contentions of Portsmouth in this regards. (See paragraph 19 *supra*.) Mr. Hirsch-

biel's duties would involve principally contacting local organizations relative to their participation in station programming. This function is to some extent to be performed in connection with his present civic activities. Similarity in this arrangement is found in Portsmouth with E. T. Gresham (R-1577), Henry Clay Hofheimer II (R-1306), John C. Aspinwall, Jr. (R-1623), George T. McLean (R-1738), and William M. Camp (R-1999). While Beachview attempted to specify the particular hours of each day to be devoted to station operations whereas Portsmouth elected to state only total hours per week, we accept Mr. Hirschbiel's testimony as to the total number of hours weekly he would devote to his duties. In view of the type of duties to be performed we attach no importance to whether they are performed at the exact hours specified. We have previously rejected Portsmouth's contentions with reference to the veracity and candor of Mr. Hirschbiel's testimony. (See footnote 7 *supra*.)

18. In considering the integration factor as it affects Portsmouth we are confronted with the effect of its voting trust. The voting trustees individually would own 37.33% of this applicant's outstanding or subscribed voting stock in amounts varying from 11.97% to 8.2%. Yet they would as a group completely control the applicant, voting 100% of the stock. Moreover, the trustees compose all of the directors and officers of Portsmouth. *It is therefore to the trustee's that we must look in appraising the integration factor, the remaining stockholders having delegated the power going with stock ownership.* Of the trustees, Hunter C. Phelan and Carl J. Burkland would devote their full time to the proposed operation, Mr. Phelan in his capacities of president and a director, Mr. Burkland as vice-president, a director and general manager of the station. Each of the other trustees propose to devote substantial time to the operation. (McLean 20 hours, Hofheimer at least 15, Cooke 15, Gresham 20, Aspinwall at least 15, Camp 20, Luter at least 15, Hutchens 15, Hardy 20) principally on committee

work and in their various capacities as trustees, officers and directors. We recognize here, as we did with Mr. Hirschbiel of Beachview, that in some cases the duties to be performed will be in connection with civic activities.

"19. This criterion recognizes that the association of an applicant's stockholders with the active management of the station tends to assure continuing effective action of the licensee in the carrying out of its proposals. Here Beachview has presented its total stock ownership to us in one form or another of integration. Portsmouth 37.33% from an outright ownership standpoint, 100% from a voting right standpoint. This factor is best exemplified where stockholders are at the helm of the station. Lesser station participation is also of some weight. However, *the integration takes on clearer meaning and force when those at the helm or participating in an active capacity have the experience necessary to conduct or favorably assist the station operations.* Of some significance also are the civic backgrounds of those so integrated. *Cf Riviera Television Corporation*, 11 RR 1113. Beachview brings to its integration on a full time basis broadcast experience of Mr. Kipnes and the record discloses that Beachview placed extensive reliance in him in the preparation of its case. (See paragraph 13 *supra.*) Mr. Kipnes shows various types of experience in broadcast activities during the years 1946 through 1953 although none is related directly to the operation of a television station. His radio managerial positions were held for relatively short periods. It also brings to its integration on a full time basis the television broadcast experience of Mr. Guidice and of Mrs. Flaherty who between them hold a total stock interest of 1.09%. They do however have some voice in management as directors of the corporation. The civic background of Mr. Cooper is extensive in the city of Norfolk. That of Mr. Kipnes is limited with Mr. Guidice and Mrs. Flaherty having no local civic connections. Portsmouth brings to its integra-

tion on a full time basis the extensive experience of Mr. Burkland in broadcasting operations. This experience has encompassed numerous phases of station operation in addition to being general manager of a Clear Channel station (WTOP) for a period in excess of five years. He has also held responsible positions with a major network involving work with both radio and television stations. Mr. Phelan has no previous broadcast experience, but has an extensive civic background. Thus we here have at the helm of one applicant Cooper and Kipnes, the former with no broadcast experience, but an extensive civic background; the latter with some radio management experience and indirect television experience and a limited civic background. Also actively participating in the operation on a full time basis would be two other stockholders having a very limited stock interest, but a voice in management, one with television experience in the production of television programs, but no local civic background. The remaining stockholders show lesser station participation with Mr. Akers having had some experience in the production of television progams and all having extensive civic backgrounds, limited primarily to the city of Norfolk. In the other applicant we have at the helm Phelan and Burkland, the former with no broadcast experience, but an extensive civic background, the latter with a more limited civic background, but a wealth of experience in the broadcast industry. The remaining trustees show lesser station participation and none has previous broadcast experience; all have extensive civic backgrounds. Both applicants present their total stock control to us in one form or another of integration. Beachview shows a greater stock percentage in its full time integration. Because of the proviso requiring an 85% majority vote however, action by the stockholders requires an alignment of at least two or more to take affirmative action with Mr. Cooper being in the position of being able to negate any action, but being unable individually to get out affirmative action. Thus his 77.77%

interest loses the usual significance such an interest would have. Each applicant has brought the broadcast experience which it possesses into its proposed operation on a full time day to day basis and each has brought extensive civic backgrounds into its full time integration. In both applicants those showing lesser participation have extensive civic backgrounds which should enable them to effectively perform the duties they have assumed. Under the factual situation of this case, Beachview has not sustained its alleged superiority in the factor of integration of ownership and management. We recognize the difference here in our conclusion and that of the Examiner who accorded a preference to Backview on this factor solely on the basis of the showing that numerically, by ratio and stock wise, Beachview's stockholders will participate to a greater degree in the management of the company than will the stockholders of Portsmouth. In our view this conclusion failed to evaluate adequately the significance which should attach qualitatively to Mr. Burkland's participation; the effectiveness of its translation in terms of effectuating the proposals of Portsmouth, from the offices which he will hold, is supported by his past operating experience which greatly exceeds that of any Beachview principal.

Corporate Structure

20. Portsmouth asserts as a point of reliance the 85% vote required to permit stockholder action in Beachview (see footnote 15 including the election of directors in comparison with the requirement in the case of Portsmouth of only a majority vote. It is asserted that there is thus greater assurance that commitments made by Portsmouth can be carried out than with respect to Beachview where a small minority can prevent stockholder action.

21. We have touched on this point in our conclusions as it affected the factor of integration of ownership and management. Such 85% voting requirement does give

to minority stockholders additional influence over corporate actions, and it was testified that the requirement was designed for this specific purpose. Beachview's point of reliance 11 also asserts this point. As previously stated, it also places Mr. Cooper in the position of a stockholder able to negate action, but unable to assert affirmative control. Under present ownership interests, it also places Mr. Cooper and Mr. Kipnes, parties closely associated with each other and the ones responsible for formation of the Beachview applicant, in the position of being the only two stockholders who in combination would be able to assert affirmative stockholder control, including the election of directors. The adoption of this requirement, however, is a matter solely under the control of the parties involved and the Commission will not award a preference to a competing applicant solely because of its adoption. We believe its consideration proper only insofar as discernible effects are present; to do otherwise would be to enter the realm of speculation as to future possibilities. We have considered in our previous conclusions the discernible effects of this proviso on the various factors asserted by the parties.

22. Beachview asserts that the corporate structure and organization of Portsmouth is designed to permit some eleven persons designated as voting trustees to obtain control over the Class A and Class B stock of the corporation at the expense of some fifty other stockholders upon a negligible financial outlay. It is contended that this raises a question concerning the character of the applicant and the parties associated therewith. It further asserts that "The affairs of Portsmouth have been conducted in such manner as to indicate that the stockholders will not actively participate prospectively in decisions affecting programming, operation, and related matters." In support of the latter contention Beachview cites the minutes of a joint meeting of the directors and stockholders as shown in Appendix A hereto. It also asserts that the stockholders of Portsmouth essentially regard the proposed station as a

business investment as illustrated by the fact that 50 of the 61 stockholders have divested themselves of all effective legal rights normally implicit in the ownership of corporate stock. It is contended that such an extensive divestment of responsibilities on the part of stockholders in a would be television licensee, raises a public interest question.

23. In his Initial Decision the Examiner found no significant differences between the parties except in integration of ownership and management, which has previously been discussed, and the effect of Portsmouth's voting trust. With reference to the latter, the Examiner stated "All of the trustees of Portsmouth except one testified at the hearing and the conviction is inescapable that they are men worthy of the highest trust. Their stature in the area is indisputable. It is likewise apparent that they would do a good job in the management of the station. These excellent factors must suffer, however, before the adverse implications, *as a matter of principle*, of a numerical majority of practically 5 to 1, holding 62.71% of the total stock, deserting their rights and duties to a well-nigh irrevocable trust." (Underlining supplied) He then concluded that "The abandonment of their rights and duties by 50 Portsmouth stockholders to 11 voting trustees is contrary to the public interest."

24. In arriving at the above, the Examiner recognized that the specific voting trust here involved was previously considered by the Commission, but stated in connection therewith that "Commission approval of the transfer by no means implies Commission approval of intent or consequences."

25. Here we have voting trustees whose stature in the area as found by the Examiner is indisputable, they have extensive civic records, all are local residents with the concomitant interest in the community, all are directors of the corporation, and all have stock ownership in the applicant

which in the aggregate, is substantial. The stock ownership is widely distributed among 61 individuals embarking in a new business. The trust may be revoked by majority vote of the deposited shares. We are requested to rule that this voting trust is contrary to the public interest. Voting trusts are not new to the Commission. (*McClatchy Broadcasting Co.*, 9 RR 1209, *Hearst Radio, Inc.*, 6 RR 994) As in the case of Beachview's 85% voting proviso, we believe consideration of this voting trust proper only insofar as discernible effects are present. We have considered in our previous conclusions the discernible effects of the voting trust of Portsmouth on the factors asserted by the parties. We see no merit whatever in Beachview's contention that the voting trustees may obtain control over the corporation upon a negligible financial outlay at the expense of some fifty other stockholders. Any person or persons in a fiduciary corporate relationship as an officer, director or, as in this case, also a voting trustee, may violate the trust reposed in him or them by other stockholders; if such occurs, trust law has set up safeguards and penalties for the protection of the parties whose rights have been violated. Not one iota of evidence has been introduced in this proceeding demonstrating any intent or tendency on the part of Portsmouth's trustees who are also its officers and directors to engage in such acts. All evidence is to the contrary. We have found that the fifty non-voting stockholders will not participate in decisions affecting Portsmouth's proposed operation and the effect such non-participation will have thereon. We have found no evidence indicating that they regard the proposed station solely as a business investment to the exclusion of the public interest and cannot assume such fact because Portsmouth has elected to operate under a voting trust arrange-

[1] The Commission has the statutory duty of determining prior to grant of an application that the proposed operation thereof would be in the public interest. We previously so concluded in approving the transfer of control of Station WAVY. (See paragraph 26, *supra*.)

ment. We believe the Examiner was in error in his conclusions relative to Portsmouth voting trust, its intent and effect and so conclude.

Program Policies and Proposals

26. Both Beachview and Portsmouth urge in points of reliance superiority to the other in program proposals. Specifically, Beachview asserts that it will provide more live programming; that it will provide more live and more sustaining programming during prime evening listening hours; that it proposes a greater percentage of educational programming and newscasts of local origin contrasted to Portsmouth's proposal of wire news. Beachview also asserts superior planning through personal contacts in arranging programming, a more comprehensive and effective survey to ascertain local program needs and available talent and more fully planned and developed local programs. Also related to programming, it asserts that it proposes a "genuinely independent" operation whereas Portsmouth proposes a network operation which would merely bring the programs of a network presently being received in the area.[*] Portsmouth asserts superior agricultural programming; superiority due to its proposal for special programs to meet the shipping needs of the area served; superiority due to its proposal of special programs to meet the needs of the armed services personnel in the area served; and more extensive news coverage of a local nature. Portsmouth also asserts superior planning through more extensive contacts in arranging programming.

27. Beachview proposes to operate 95 hours weekly, Portsmouth 108 hours under its independent operation.[**]

[*] The Examiner rejected Beachview's point of reliance that the proposal of Portsmouth is designed to retard and prejudice economically an existing UHF station now affiliated with NBC in view of its network proposal. We here specifically affirm this rejection, resolving solely competitive aspects of the broadcast industry present in any community having more than one station.

[**] Portsmouth's network proposal will not here be considered except to the extent shown in paragraph 57, *supra*.

We have considered the points of reliance, substantially as summarized, in the light of the findings made on the basis of the record. We have noted the conclusion of the Examiner that if taken at face value neither applicant's programs show even a modicum of superiority over the other's, with the possible exception that Portsmouth's agricultural programs may be superior to Beachview's, and that Beachview's "Miss Ruth Anne's Kindergarten" deserves a token of merit as the only show of production-proved quality in the entire proceeding.

28. In this area of comparison the Commission primarily looks at the overall proposal in terms of its balance. If weaknesses in balance are discerned, if inattentiveness to programming for demonstrated public needs is shown, comparative demerit follows. By agreement of counsel (R-182) neither party offered any census or economic data as to the area in question. Nor was evidence in the form of a separate exhibit as to the nature of the area to be served adduced. The record however does show, primarily in connection with the proposed programming and planning of the applicants, that there are extensive marine and armed services activities located in the Norfolk-Portsmouth-Newport News area. Each applicant proposes a diversified, well-rounded program service with adequate provision for local live programming. We have here taken into consideration the difference in classification of news programs, live by Beachview-wire by Portsmouth, but as shown in our findings, basically there is no difference in the types of material included. We have also taken into consideration the effect on the local live programming of Portsmouth in the event its hopes of securing a network are realized, and as reflected in our findings, such eventuality if realized would overall have no adverse effect and would in fact have little effect even as to individual program types. The principal effect would be to substantially reduce recorded (film) programming and to substitute network programs therefor. Some, but no major

reduction in wire and live programming would also result. In its independent operation Portsmouth proposes to devote 48.46% of total time to local live programs, 36.32% to such programs under the network proposal. Beachview proposes to devote 59.21% of total time to such programs. However, Beachview's greater percentage is to an extent offset by the larger number of operating hours proposed by Portsmouth and by the further fact of the difference in classification of news programs previously noted. Considering these factors, under its independent proposal Portsmouth would devote a slightly greater number of hours to such programming than would Beachview (approximately 20s under its network proposal a lesser number (approximately 7.5). In our view these differences are not such as to warrant a preference to Beachview as each proposes adequate time to fulfill the particular needs of the area to be served; nor is the greater percentage of time devoted to live and sustaining programming shown by Beachview during the hours of 6:00 p.m. to 11:00 p.m. a factor of significance. Portsmouth also shows a substantial amount of time under either operation devoted to such programs during these hours which demonstrates no lack of attentiveness in this respect. The proposals with respect to the important classifications, as set forth in our findings, are adequate as to both parties, and in balance, the proposed programs in each classification being neither minimal nor disproportionate. Overall, the programming of each applicant should meet the needs of the area to be served. Thus, in the most significant area of comparison involved in the programming factor, the equivalent status of the applicants is established. With reference to specific programs in the education category, while both have recognized the educational needs of the area, and propose specific programs to meet such needs, Beachview shows a greater attentiveness to these needs than does Portsmouth. On the other hand, though each, in its program proposal has recognized the special needs of the area arising from the exten-

sive marine and armed services activities located therein, as is shown in our findings in paragraphs 64 and 68. Portsmouth, through its special marine weather forecasts in addition to its other marine programs, shows more attentiveness to this distinct local need than does Beachview. We do not find any material differences in the proposed news programming of the applicants aside from the special weather forecasts of Portsmouth previously discussed. We cannot accord the "token of merit" given by the Examiner to Beachview's entertainment program "Miss Ruth Anne's Kindergarten." There is no showing in this record that the other programs proposed cannot be produced or will not be of acceptable quality or that this program would be of exceptional quality. Nor do we deem it material that Beachview proposes what it terms a "genuinely independent" operation whereas Portsmouth desires a network affiliation if one can be secured. As previously found, there is no evidence in this proceeding that Portsmouth will be able to secure a network affiliation and if one is secured the major difference in the service rendered will be to substitute network for film programming.

29. Each applicant has asserted superior planning. Our findings herein fully reflect the planning of each. Both applicants have set forth their proposed operating policies. We find no deficiencies in either and no material differences between such policies. While Portsmouth makes no definite commitment as to an exact percentage of total time which would be devoted to commercial programs whereas Beachview does, its expected maximum total is stated accompanied by the assurance that any increase would be discussed beforehand with the Commission. Each applicant contacted a number of various organizations in planning its proposed local programming. The record shows

Portsmouth, in the course of the proceeding considered these programs under the categories of news, agriculture and marine programs. In view of their composite nature, for convenience we have shown them in our findings of fact under news.

more extensive contacts were made by Beachview prior to preparation of its actual proposals; however, a large number were also made by Portsmouth. In addition, Portsmouth has tested certain of its programs in its radio operation with the specific object of determining the practicability of carrying such programs over into television. Portsmouth also made contacts through its members relative to determining the feasibility of its local program proposals and assuring the cooperation of the organizations involved. Both made adequate film surveys to establish the type and quality of film available and conformed such programming to the information secured. From the standpoint of prior planning, each has given adequate assurance that it should be able to produce its programming substantially as proposed.

30. In summary, we see no basis for preference between the applicants from the standpoint of program proposals or planning.

Staff

31. Beachview asserts the greater number of employees proposed by it (130 to 86), the broadcast experience of proposed staff members, and the fact that specific provision is made for an Educational Director as factors favoring grant of its application. Portsmouth asserts the broadcast experience of proposed staff members and the fact that they have had opportunity to work together as a unit as factors favoring grant of its application. Our findings show the staffing plans of each applicant. Neither applicant has as yet completed the choice of its key staff complement. The broadcast experience of the selected members of each applicant has been set forth in our findings and each demonstrates qualifications to fulfill the duties of the position involved. We do not deem material the fact that Portsmouth has not named an Educational Director in the absence of some showing that such fact would adversely affect its proposed programming. None has here been

made. Nor can we conclude that the deficiencies alleged by Beachview to be present in Portsmouth's staff proposal (see paragraph 79 *supra*) demonstrate inadequacy of staffing or staff planning. The failure to list a cameraman on duty after 8:30 p.m. on Sunday is the only matter alleged deserving mention. In view of the limited nature of the live programs proposed after that hour and the other studio personnel on duty, the matter is of no importance. Similarly, the greater size of the staff proposal of Beachview is of no importance in the absence of a showing of program superiority on the part of Beachview resulting therefrom or of inadequacy in the proposal of Portsmouth. No such showing has been made. Nor can we conclude that the broadcast experience of the proposed staff members of Portsmouth and the fact that they have worked together as a unit is of importance in the absence of a showing of program superiority (including effectuation) resulting therefrom. None has been made. We conclude therefore, that on the basis of this record the applicant prevailing will be able to carry out its programming proposals on the basis of its proposed personnel.

32. Beachview asserted superiority of its equipment proposal (other than transmission and associated facilities) as a point favoring grant of its application. The asserted superiority is based primarily on the difference in number of cameras proposed. Yet each has proposed adequate equipment to permit the carrying out of its program operations. We have previously disposed of Beachview's contention relative to the failure of Portsmouth to list minor items of equipment which were on hand. (See footnote 27). No substantial difference is therefore present in this respect.

Diversification of Communications Media

33. Beachview asserts as a point of reliance that it should be preferred because a grant to Portsmouth would mean that all five channels "allocated to the area involved"

would be in the hands of standard broadcast licensees whereas Beachview is not now the licensee of any radio facility nor does it otherwise have a medium of mass communication. The Examiner treated this point of reliance under the general diversification of communications media criterion, and concluded that in view of the number of broadcast facilities located in the area, the factor was not of significance. In its exceptions, Beachview asserts that "The paucity or abundance of broadcast facilities has no conclusive, or indeed in this case, meaningful, relevance to the point at issue; i.e., whether it is a comparative factor favoring Beachview that a grant to Portsmouth would result in all assigned commercial television channels being licensed to licensees of standard broadcast stations."

34. We are not in accord with Beachview's contention that a preference is in order due to the fact that a grant to Portsmouth would mean that all five channels allocated to the area involved would be in the hands of standard broadcast licensees. Such a holding would be an extension of the diversification criterion, in our view, unsupportable from any public interest standpoint. Thus Beachview's point of reliance as to "Dual Ownership Of Radio and Television Stations In The Same Community" must fail. While not encompassed within its point of reliance, Beachview also excepts to the failure to award a preference to Beachview under the general diversification of communications media criterion. We are therefore here faced with resolving whether this should be weighed, involving as it does a matter not expressly plead affirmatively by Beachview, the applicant which seeks benefit from its consideration. (See paragraph 16 *supra* of our conclusions.) As it does involve a guide factor consistently given consideration in the public interest and we have a complete record reflecting all available facts relating to the applicants' interests in communications media, we believe it should be weighed. *Clarksburg Publishing Company* v. *FCC*, 12RR

024. The Examiner concluded that "it is difficult to see how violence to the Commission's policies on the diversification in ownership of the media of mass communication would be done by a grant to Portsmouth." As noted, Beachview excepts to this conclusion. The Broadcast Bureau does not except to this conclusion. The facts of record establish that there are a large number of broadcast facilities located in the area as shown in our findings, with Portsmouth being licensee of only one AM station. It holds no media of mass communication in any other field, nor do any of its principals. Thus a grant to Portsmouth would not tend toward concentration of control over mass media to any significant degree, when consideration is given to the above factor and to the limited facilities of its Station WAVY as contrasted to the facilities here in contest. A grant however to Beachview would be a grant to an applicant not associated with other media of mass communications in the community; thus, though the primary preference purpose of concentration is not present as above noticed—the secondary purpose exists here in some degree. In our view then, Beachview is entitled to a preference, which, under the factual situation present, is of minor weight.

Other Matters

35. Beachview makes the following charges in its points of reliance, each allegedly reflecting adversely from a comparative standpoint on the qualifications of Portsmouth, its officers, directors and stockholders, (a) that the failure of John C. Aspinwall, Jr. to indicate in the Tidewater application the beneficial interest of his father and brother in the stock shown as held by him reflects adversely on the character and background of these three individuals, all of whom are stockholders in Portsmouth; (b) that Portsmouth in its said amendment of November 18, 1953 should have disclosed the interest of eight of its new stockholders in the application of Tidewater and the failure to do so

constitutes a failure to provide the Commission with full and complete information; (c) that the restriction in the agreements between Portsmouth, Tidewater and Chesapeake relative to the stockholders participating in any application in competition with Portsmouth is not in the public interest as it prevents the freest possible association of persons who may desire to seek available radio and television facilities; (d) that the agreement to pay Tidewater an additional $2500 subject to Portsmouth receiving a VHF television channel is not in the public interest as it gives to a stranger to the applicant a direct interest in the outcome of this comparative proceeding; (e) that the conduct of J. C. Aspinwall, Jr., E. T. Gresham and R. D. Cooke, in being elected directors on November 11, 1953 and in participating as a director of Portsmouth in the November 16, 1953 Board of Directors meeting constituted a breach of the fiduciary relationship existing between them and the other stockholders. Further charges made allegedly reflecting adversely on the character qualifications of Portsmouth are that the interest expected to be acquired by Burkland should have been disclosed to the Commission, or at least the fact that it was expected that he would acquire an ownership interest, at the time of filing of Portsmouth application. It is further asserted that such nondisclosure may have been occasioned by his connection with Columbia Broadcasting System.

36. We have disposed of contention (a) in paragraph 37 herein and contention (b) in paragraph 25 and the footnote thereto. We do not find anything improper in the action of Portsmouth set forth in (c), the parties having exercised a contractual right which generally is deemed contrary to the public interest only when unreasonable. Beachview here asks us to establish as a matter of policy that this recognized private contractual right insofar as it relates to matters under our jurisdiction is contrary to the public

[*] Paragraph numbers of findings of fact.

protest. This we cannot do. There is no evidence indicating that the specific covenant here involved is contrary to the public interest. Beachview's contention must therefore be rejected. In the absence of any showing as to the manner in which the matter asserted in (d) could influence or affect the outcome of this proceeding, we fail to see its materiality. The amount involved is nominal and insofar as this record shows is reimbursement for actual expenses incurred. We therefore fail to see its relevancy to the character qualifications of Portsmouth, its officers, directors or stockholders. Nor do we believe that the matter asserted in (e) or the fact that persons formerly stockholders in Tidewater, subscribed to Portsmouth stock and were elected to office before the determination to dismiss the Tidewater application had actually been effectuated reflect adversely upon the character qualifications of Portsmouth, its officers, directors or stockholders. To so hold would be to criticize the sequence of the steps taken to effect the merger rather than of the acts themselves. There is no showing that the actions taken were improper or designed to injur or defraud or otherwise adversely affect any person or persons connected with either entity.

37. The record discloses that at the date of the filing of the application of Portsmouth on August 3, 1953 all parties thereto anticipated that Burkland would acquire an undetermined ownership interest and prior to his becoming general manager of Station WAVY in July of 1953 he was associated with Columbia Broadcasting System. The latter fact however loses all significance as his relationship with CBS had been terminated before the actual filing date of the application. Technically, the inchoate understanding that Burkland might subsequently acquire an ownership interest should have been stated in the application. As set forth in paragraph 31 *supra*, Mr. Burkland was employed on a straight salary basis until November 11, 1953 at which time the understanding as to his acquisition of an ownership interest was reduced to a definite agreement.

This fact was timely reported by amendment filed on November 18, 1953. We therefore agree with the statement of the Examiner that this matter is of little or no consequence. Being merely a technical omission and of no consequence we cannot agree with the Examiner that it must be considered as reflecting adversely upon Portsmouth due to the fact that no justification was shown. As stated in footnote 4 relative to Mr. Cooper's interest in Tauben Company, Inc., an omission cannot assume such importance where its inclusion could in no manner affect Commission consideration.

Summation

38. We have considered each of the points of reliance urged by the parties. Both urged local residence as a factor favoring grant of its application, Portsmouth emphasizing the long term residence of its stockholders and the fact that they are the leading citizens not only of Norfolk, but also of other communities within the service area of the station proposed. Beachview emphasized the Norfolk residence of its stockholders. We have concluded that neither has shown material superiority in this factor and have awarded no preference. Portsmouth did establish the prominence in community civic activities of its voting trustees, concerning which detailed findings have been made. Its superiority in this factor gives to its proposal greater assurance of knowledge of the needs of the community and, from such knowledge, a greater probability of their effectuation may be drawn. We have also concluded that Beachview failed to establish its asserted superiority in broadcast experience, integration of ownership with management and equipment, and that the parties made equivalent showings in these respects. Portsmouth did not assert superiority in these factors. We have concluded that neither applicant has established its asserted superiority in proposed programming, program planning, policies, or staffing plans. We have extended a preference to Ports-

mouth on the basis of its past operation of Station WAVY, but a minor one, it being recognized that the present stockholders have controlled the station for only a short period of time commencing shortly before this proceeding began. We have extended a minor preference to Beachview on the factor of diversification of communications media.

39. We have considered the factors alleged by each applicant as unfavorably affecting the corporate structure of the other, in the case of Beachview the 85% majority stock vote necessary for affirmative action, in Portsmouth the voting trust agreement of the stockholders and we believe, placed these matters in proper perspective. We have also considered the numerous charges leveled at Portsmouth by Beachview allegedly reflecting adversely on its qualifications and those of its officers, directors and stockholders. We have found nothing material or substantial in any of these charges and have so concluded. We have also considered the matters asserted by Portsmouth to reflect adversely on the backgrounds of Mr. Hirschbiel, Mr. Cooper and Mr. Kipnes of Beachview. We have found nothing material or substantial to the charges made against Mr. Cooper and Mr. Hirschbiel and have so concluded. We have found that the charges made against Mr. Kipnes are sustained by the record, that they are of substance and material and have concluded that his conduct in that connection demonstrated irresponsibility of a kind not conducive to lending the same assurance as obtained from the showing made by Portsmouth of conducting an effective television operation in the public interest. We here have a factor asserted by Beachview as favoring grant of its application, i.e., that the backgrounds of its stockholders are more varied and better designed to insure an effective television operation in the public interest when contrasted to those of the voting trustees of Portsmouth, in which we believe Portsmouth in fact shows superiority although not having asserted it as a factor favoring grant of its application.

40. On the basis of the points of preference asserted by the parties, Portsmouth prevails in the only two in which comparative differences are found: civic participation and past broadcast record. Portsmouth's overall record in the operation of Station WAVY does lend some additional assurance of effectuation of its proposals made herein. On one other factor, diversification of communications interests, not asserted by Beachview, we have found a minor preference for Beachview. Crediting this preference to Beachview, we are of the view that Portsmouth is nevertheless comparatively superior and is the applicant more qualified to bring a television service in the public interest. Thus, without regard to any factor in which we believe Portsmouth to have demonstrated superiority although not asserted as a point of preference, we believe it has demonstrated the best aggregate qualifications. Our decision therefore must favor Portsmouth Radio Corporation. On the remaining factor of difference herein found—background of principals, not however affirmatively asserted by Portsmouth, we have concluded that the latter is superior.

Accordingly, IT IS ORDERED, This 29th day of May, 1956, that the application of Portsmouth Radio Corporation for a permit to construct a new commercial television station in Portsmouth, Virginia on Channel 10 IS GRANTED, subject to the conditions that its antenna structure shall be painted and lighted in accordance with Part 17 of the Commission's Rules including hazard markings, and such other markings as may be subsequently specified, and that the application of Beachview Broadcasting Corporation for the same facilities IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

MARY JANE MORRIS

Secretary

Released: May 31, 1956

Appendix A

Order Governing Course of Proceeding

Supplemental Order Governing Course of Proceeding

Order Adding Points of Reliance

(Attached to Initial Decision, pages 54a-73a, *supra*).

FCC 56-945
36312

FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D. C.

In re Applications of

BEACHVIEW BROADCASTING CORPORATION Norfolk, Virginia	Docket No. 10800 File No. BPCT-1605
PORTSMOUTH RADIO CORPORATION Portsmouth, Virginia	Docket No. 10801 File No. BPCT-1750

For Construction Permit for New Commercial Television Broadcast Stations

MEMORANDUM OPINION AND ORDER

By the Commission: Chairman McConnaughey dissenting and voting to grant; Commissioners Mack and Craven abstaining from voting.

1. The Commission has before it for consideration the petition for rehearing, reconsideration, grant of application of Beachview Broadcasting Corporation, and for stay, filed on July 2, 1956 in the above-entitled proceeding by Beachview Broadcasting Corporation, and opposition thereto filed on July 12, 1956 by Portsmouth Radio Corporation. The petition is directed to the Commission's

Decision of May 29, 1956 released on May 31, 1956 (FCC 56-497) granting the application of Portsmouth Radio Corporation (hereinafter also referred to as Portsmouth) for Television Channel 10 at Portsmouth, Virginia, and denying that of Beachview Broadcasting Corporation (hereinafter also referred to as Beachview) for the same channel at Norfolk, Virginia. Oral argument on the petition is requested.

2. The procedural history of this case is set forth in paragraphs 1 through 6 of the Commission's Decision, and need not be repeated.

3. We have considered the arguments set out in Beachview's petition and have concluded that adherence to our Decision of May 29, 1956 is clearly required. Essentially all of the contentions here made have previously been urged by petitioner in its proposed findings of fact and conclusions of law, its exceptions to the Initial Decision of the Examiner, its reply brief, and in oral argument before the Commission. These contentions were fully considered in our Decision of May 29, 1956, and we adhere to our conclusions with respect to them. Oral argument would therefore serve no useful purpose here, and this request will be denied. Certain matters, however, will be discussed.

4. We have reviewed petitioner's contentions as to the asserted deviations from Commission criteria, particularly in the matter of integration of ownership with management, and here point out the factors present in this case, i.e. the particular voting trust found in Portsmouth and the proviso requiring an 85 percent majority vote to permit stockholder action by Beachview.[1] The factual situations present in the cases of *KTBS, Inc.*, 10 RR 811; *KFAB Broadcasting Co.*, 12 RR 317; and *McClatchy Broadcasting Co.*, 9 RR 1190 cited by petitioner bear little similarity to those

[1] No consideration of the effect of this proviso and no objection to the Commission's findings and conclusions with regard thereto are presented in the instant petition.

here present. Relative to the contention of Beachview, which is again asserted here, that it is entitled as a matter of law to a comparative preference based solely on the fact of the existence of the Portsmouth voting trust, we adhere to our original views as to both this assertion and that of Portsmouth, previously advanced, that it was entitled to a comparative preference based solely on the fact of the existence of the 75 percent majority voting proviso of Beachview. We have also reviewed the contentions made as to the relation of broadcast experience to the integration factor. In our conclusions the civic backgrounds and broadcast experience brought to the integration factor by each applicant are detailed. The pertinence thereof in terms of demonstrating an ability and readiness on the part of the applicant to translate its programming proposals into program production in the public interest is clear. A similar approach has been taken in other Commission decisions. (See *Biscayne Television Corporation*, 11 RR 1113; *Appalachian Broadcasting Corporation*, 11 RR 1327; *WMR, The Goodwill Station, Inc.*, 9 RR 227; *WDOD Broadcasting Corporation*, 10 RR 1119; *Rochester Broadcasting Corporation*, 8 RR 1113; *Aladdin Radio and Television, Inc.*, 9 RR 1). In appraising an applicant's proposal, the Commission cannot completely isolate each criterion, make a determination on each and, by the simple expedient of adding plus and minus marks arrive at a reasoned determination as to which applicant would provide the better operation in the public interest. This fact was made abundantly clear in paragraph 3 of our conclusions. We are here aware of petitioner's characterization of this paragraph as presenting "a wholly distorted picture of the facts involved in the case at issue—totally unrelated to the record" which characterization we do not accept. As to petitioner's contentions relative to the weight accorded the active participation of trustees other than Mr. Burkland in Portsmouth's proposed operation, the record evidence as pointed out in the Decision shows that Mr. Phelan (who,

petitioner states, should not be considered in the integration factor) had for some time devoted his full time to the operation of Portsmouth and proposed to continue to do so in overall supervision of its operations. As to the charges relative to consideration of the other trustees in the integration factor, the proposal was not that of spending a minimal amount of time in an advisory capacity as a member of a committee, but rather that each is to devote substantial time to the station operation in active assistance in arrangements for programming in addition to the performance of their duties as officers, directors and trustees. Thus, we here have a showing that these individuals will be integrated into the station's operations. The evidence of record fully sustains the conclusions set forth in our Decision as to the integration factor.

5. There is no merit in petitioner's contention that significance was accorded matters not placed in issue by the parties' points of reliance. We reiterate that the record evidence as to the background of Beachview's stockholders, including that of Mr. Kipnes, was encompassed both within the points of reliance and the issues; and further, had it not been within the points of reliance, the Commission could properly have considered this evidence. Were the contention to be accepted, however, it could not alter our Decision which discussed but did not rest upon this consideration. See our language in paragraphs 16 and 40 of the conclusions. With respect to the petitioner's point that diversification of the media of mass communications was encompassed within its affirmative case, this question is an academic one since the Decision clearly reflects that complete account was taken of this factor as it bears upon the circumstances of the proceeding, notwithstanding that Beachview emphasized a tangential consideration in this connection. Not only did the Decision weigh the diversification factor fully, it awarded Beachview a minor preference thereon.

6. Beachview also here asserts it "is entitled as a matter of law to a comparative finding related to the fact that Portsmouth's stockholders will not participate prospectively in decisions affecting the corporation." It is asserted that "The decision fails utterly to give comparative consideration to this issue." The dictionary meaning of the word prospective is "that is in prospect" or "expected confidently." The contention relates to the participation to be expected of the stockholders of the respective applicants in corporate decisions. This we fully covered in our Decision. We considered the voting trust of Portsmouth. We considered the 85 percent stockholder vote necessary for corporate action by Beachview. We considered the participation in the proposed television operation by each stockholder. We considered the planning of each applicant. Petitioner, in its point of reliance 20 and here, urges the minutes of a joint meeting of Portsmouth directors and stockholders on November 11, 1953 as supporting its argument. The action cited shows that as a result of discussion after reading the minutes of all previous meetings of the Board of Directors, Executive Committee and Stockholders certain actions taken by the Executive Committee and Board of Directors should have been approved or taken by the stockholders. The actions taken by affirmative vote of all present were formally ratified and approved. Eight stockholders were present in person, with George T. McLean and Henry Clay Hofheimer, II, holding proxies to vote the stock of all stockholders present in person and, in addition, the stock of the 19 stockholders not present. In addition to the action cited by petitioner, as reflected in our decision, a number of other actions were also taken at this meeting. Petitioner apparently is here asking that we find on this basis, and the fact that a later stockholder meeting was sparsely attended, that it is entitled to a comparative finding that Portsmouth's stockholders will not participate in future decisions affecting the corporation. We cannot attach such significance to these incidents

in the face of the testimony by the numerous Portsmouth principals appearing and testifying in this proceeding as to their participation in the proposed operation and the time to be devoted thereto.

7. The other matters asserted by petitioners warrant no further discussion, since our Decision adequately covered them, and no new matter relative thereto has been presented. There is no merit in the question raised as to the legality of the Commission's vote.

8. In view of the foregoing, IT IS ORDERED, This 3rd day of October, 1956, that the said petition of Beachview Broadcasting Corporation for rehearing and other relief IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
MARY JANE MORRIS
Secretary

Released: October 8, 1956

FCC 57-429
44150

FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D. C.

In re Applications of

BEACHVIEW BROADCASTING CORPORATION Norfolk, Virginia	Docket No. 10800 File No. BPCT-1605
PORTSMOUTH RADIO CORPORATION Portsmouth, Virginia	Docket No. 10801 File No. BPCT-1750

For Construction Permit for New Commercial Television Broadcast Stations

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Lee not participat-

1. The Commission has before it for consideration (1) a second petition for rehearing filed on October 25, 1956 by Beachview Broadcasting Corporation requesting reopening of the record, further hearing and stay of effectiveness of the Decision in the above-entitled proceeding; (2) a pleading termed "Supplemental Petition to Reopen the Record For Further Hearing, and For Stay" filed on November 14, 1956 by Beachview Broadcasting Corporation; (3) a pleading termed "Further supplement to Petition to Reopen the Record, For Further Hearing, and For Stay" filed on December 31, 1956 by Beachview Broadcasting Corporation; (4) Motion to Strike Further Supplement filed by Portsmouth Radio Corporation on January 9, 1957; (5) Memorandum by Portsmouth Radio Corporation of February 4, 1957; (6) Motion For Leave to File Additional Pleadings filed on February 21, 1957 by Beachview Broadcasting Corporation (7) oppositions to the said petition and supplemental petition filed on November 5, and November 21, 1956, respectively, by Portsmouth Radio Corporation; (8) reply to opposition filed on November 26, 1956 by Beachview Broadcasting Corporation; (9) opposition to Motion to Strike filed on January 14, 1957 by Beachview Broadcasting Corporation; (10) opposition to Motion For Leave to File Additional Pleadings filed on February 28, 1957 by Portsmouth Radio Corporation; and (11) Reply to opposition to Motion For Leave to File Additional Pleadings filed on March 5, 1957 by Beachview Broadcasting Corporation.

2. By Decision released on May 21, 1956, the Commission granted the application of Portsmouth for a construction permit for a new television station to operate on Channel 10 at Portsmouth, Virginia and denied that of Beachview for the same facility at Norfolk, Virginia. The procedural history of the hearing proceeding is set forth in paragraphs 1 through 6 of the Decision and need not be repeated. By Memorandum Opinion and Order released on October 8, 1956, the petition of Beachview Broadcasting Corporation

for reconsideration of this Decision was denied. A notice of appeal of the Decision was filed on October 23, 1956 by Beachview in the United States Court of Appeals for the District of Columbia Circuit. Thereafter, on the dates noted above, the instant pleadings were filed.

3. Petitioner basies its second petition and first supplement thereto on claimed newly discovered evidence. This consists of a copy of a document which on its face is a partial copy of a memorandum relative to an organizational meeting of a proposed corporation at one point contemplated by parties some of whom together with a number of other individuals ultimately acquired Station WAVY, Portsmouth, Virginia through purchase of all outstanding stock of the licensee corporation, Portsmouth Radio Corporation.[1] Additional alleged newly discovered evidence is contained in an affidavit of Irvin M. Kipnes, secretary and a director of Beachview in which it is averred that on October 16, 1956 he placed a telephone call to one Sidney Kellam; that he, Kipnes, expressed the hope "that he [Mr. Kellam] had a good hunk of the station since it was worth a lot of money"; that Mr. Kellam replied that he had "a little bit of it - not much," and that one Fred Haycox "may have a little." It is contended that this evidence was not previously available to petitioner and that it is material to the issues in the hearing. In support of this contention Beachview states that it alleged in the hearing non-disclosure by Portsmouth Radio Coporation of material information and the supplying of erroneous information to the Commission of a nature reflecting adversely upon the character and background of the corporate applicant and the individuals associated therewith.

4. Petitioner asserts that the partial memorandum submitted discloses, contrary to the evidence on which the

[1] The first page of this document was missing when submitted by Beachview. Portsmouth in its opposition to the petition furnished a copy of this missing page.

Commission's conclusions in paragraphs 35 and 37 of the decision were based, that the agreement between Portsmouth and Mr. Burkland "had been formalized in all major respects at least eight months before the application for construction permit was filed on August 3, 1953." It is further contended that this document establishes the proposed incorporators as a group in privity within Commission definitions, giving rise to a transfer of control when those individuals among this group who did subsequently acquire an interest in Portsmouth Radio Corporation ceased to hold *in toto* in excess of 50% of the stock of Portsmouth.

5. The partial memorandum fails to support petitioner's assertions based thereon. If it were deemed to have any materiality to the proceeding, it would serve only to confirm the Commission's findings in paragraph 31 of the decision relative to the alleged non-disclosure of Mr. Burkland's interest in Portsmouth. Events that transpired at an organizational meeting of a proposed corporation which never came into being can have no materiality to this proceeding. This memorandum, however, shows that as to the contemplated corporation no definite agreement as to the stock interest which would be held in it by Mr. Burkland, or as to his employment as station manager, had been reached at the time of its preparation. In paragraph 31 of the Commission's decision the following appears:

> "Mr. Burkland first became interested in television in Norfolk in 1950 and took steps to establish contacts with local residents. He first went to Norfolk in May of 1952 and through 'Charlie' Duke a group was subsequently organized which in July of 1953 purchased radio station WAVY. Mr. Burkland at this point held no ownership interest in the licensee, *but throughout the period of organizing this group, he contemplated holding a stock interest in the company and being its general manager* (R-957). His understanding with the company called for a stock interest at the time a television construction permit was received and that

he was to become general manager of the station." (Underlining supplied.)

In footnote 17 of the above-quoted paragraph it was stated:

> "Insofar as the record shows, no definite agreement had been reached by the parties at this time as to the stock interest to be acquired by Mr. Burkland, or as to his employment as station manager."

Thus, any materiality this document might have would only serve to confirm the findings made based on testimony of record which was fully credited.

6. As to the contention that the said memorandum and the actions set forth therein establish the proposed incorporators as a group in privity within Commission definitions, we know of no precedent therefor and are cited to none by petitioner. In our view nothing is set forth therein which in any manner supports this contention.

7. In its opposition filed on November 5, 1956 Portsmouth admits that insofar as the Portsmouth application, hearing exhibits and Portsmouth corporate records show, the only stockholder of record from among the three Kellam brothers is Floyd Kellam, holder of 1.32% of the non-voting stock and of trust certificates representing a beneficial interest in 1.14% of the corporation's voting stock. Floyd Kellam is not an officer, director or voting trustee of this applicant. It is also averred in an affidavit of Carl J. Burkland, vice-president, a director and voting trustee of Portsmouth, that, while Mr. Sidney Kellam participated in the early organizational efforts of the proposed new corporation, to the best knowledge and belief of affiant, he acquired no stock ownership interest in Portsmouth Radio Corporation thereafter. Portsmouth also acknowledges (by affidavit of Floyd, Richard and Sidney Kellam), however, that while the aforesaid stock interest was taken in the name of Floyd Kellam, Richard and Sidney Kellam did

advance one-third each of the purchase price with the understanding that both legal and equitable title was to remain in Floyd Kellam, subject to demand by Richard or Sidney Kellam for transfer of one-third of the beneficial interest, or in lieu thereof repayment of the money advanced. Relative to the Sidney Kellam interest, therefore, we have a charge of an undisclosed interest being held by him and an admission by Portsmouth that such charge is not only true as to Sidney Kellam, but also as to Richard Kellam. The matter being uncontroverted, no purpose would be served by reopening the record prior to Commission appraisal thereof. As to the charge as to Fred Haycox, petitioner submits nothing more than the statement of a third party that he may have an interest. Lacking substantiation, this charge merits no further consideration.

8. In appraising these beneficial interests of Sidney and Richard Kellam, of importance is the size of the interest involved. Beachview urges that the minor nature of the Kellam stock interest is conclusive of nothing as the power and influence exercised by individuals over a corporation are not necessarily in proportion to stockholdings. Such a contention, however, could be supported only if the party were in a position to exercise influence as an officer or director of the corporation or at least through some manner of active participation. Here, as shown in our decision (paragraphs 26, 42 of the findings of fact, paragraphs 22-25 of conclusions), none of the Kellams can exercise voting rights and none would actively participate in Portsmouth's operation. The interests involved are *de minimis*, not required to be reported under Section 1.343 of the Commission's Rules relative to station ownership.

9. Petitioner also, however, raises the question of fraud in this matter urging that "the public interest in maintaining the Commission's processes free from fraud, misrepresentation, and trifling by applicants will require that Portsmouth be absolutely disqualified" or in any event that "it

cannot seriously be contended that they will not weigh conclusively against Portsmouth in any comparative consideration." The cases of *FCC* v. *WOKO*, 329 U.S. 223; *Hall et al.* v. *FCC*, 14 RR 2009 and *McClatchy Broadcasting Company* v. *FCC*, 13 RR 2072 are cited in support of this contention. In the instant situation we fail to see any fraud or misrepresentation involving the Commission's processes. There has been no pattern of deliberate concealment and misrepresentation involving substantial stock interests over a period of years such as that present in the case of *FCC* v. *WOKO*. Table I of FCC Form 301 Application For Authority to Construct a New Broadcast Station does not require the listing of stockholders having less than a 3% interest unless they are officers or directors, where a corporation has more than 20 stockholders, as does Portsmouth. Our ownership reports do not require the listing of stockholders having less than a 1% interest with respect to a corporation having more than 50 stockholders, as does Portsmouth. Thus at such time, if it occurs, that Sidney and Richard Kellam acquire legal title to their beneficial interests, the same need not be reported to the Commission. Only under circumstances involving determination of special questions such as compliance with statutory citizenship requirements or the financial qualifications of an applicant would such information be specifically requested by the Commission. Such information was not here required. Under such circumstances we fail to see any materiality of this matter to either the absolute or comparative qualifications of Portsmouth. The matter therefore raises no issue of material fact which could in any manner affect the grant made. Failing to do so, the cases of *Hall, et al. v. FCC* and *McClatchy Broadcasting Company* v. *FCC*, *supra*, have no applicability.

10. By its pleading termed "Further Supplement to Petition to Reopen the Record, For Further Hearing, and For Stay," Beachview asserts that Portsmouth is financially disqualified by reason of departures from its propos-

als relative to construction of the studios to be utilized. The asserted departure is that Portsmouth is now paying the costs of remodeling an existing building for studios rather than their being constructed by a second party and leased to Portsmouth. The pleading also sets forth the change made in Portsmouth's studios of which the Commission had been notified, whereby an existing and more centrally located building is being remodeled for studios rather than a new building being constructed. In this connection, petitioner states that upon the basis of Portsmouth's proposal that new studios would be constructed specifically designed for television, it was lured into entering into a stipulation that proposed studios would not be made a matter of comparative consideration in the hearing proceeding. Other charges made are that it adequately appears that George T. McLean (a vice president, voting trustee and largest single stockholder of Portsmouth) in flagrant disregard of his manifest fiduciary duty, sought to withhold information from his fellow trustees for his personal (family) financial benefit; that internecine conflict exists within the Portsmouth organization; and that Portsmouth knowingly misrepresented its financing and studio plans to Beachview and the Commission.

11. Of the matters asserted in this further pleading, no one of them is supported except as to the change in studios. As to the change in financing, petitioner submitted a financial report assertedly submitted to the firm of Goodman, Segar and Hogan, Inc., real estate and mortgage loan brokers, in seeking a loan from that firm. Portsmouth, in a pending application for modification of construction permit (File No. BMPCT-4461) for extension of completion date and in its memorandum herein states that it did in order to secure a lower studio rental contemplate the financing of the studio remodeling from the proceeds of a loan. It, however, could not negotiate such loan and consequently had to proceed with its original proposal whereby the studios would be financed by another party and leased

to Portsmouth. The only variance found is that it will pay the sum of $36,000 annual rental rather than $30,000. This difference is of no consequence in view of the financial showing made by Portsmouth and relatively inconsequential nature of the sum involved. The financial qualifications of the applicants were not in issue in this proceeding and nothing has here been presented warranting inquiry. Further, petitioner at no point attempted to place in issue the availability of the funds shown by Portsmouth. It did attempt before the Examiner to place in question the adequacy of the funds available to effectuate its proposal. This request was denied and not subsequently renewed, nor appealed to the Commission.

12. The charges as to violation of his fiduciary relationship by George T. McLean and of inter necine conflict are based on the asserted statement of an unidentified employee of Portsmouth. To place any credence in these assertions would require the crediting of hearsay statements by an unidentified party. More is required than this to persuade us that we should exercise our discretion to permit rehearing. Unsubstantiated charges of this nature could be made in virtually every proceeding that comes before us. To order rehearing on such basis, if it be assumed that otherwise rehearing was warranted, would lead to utter confusion in the Commission's processes and interminable delay to the providing of service, all to the injury of the public.

13. Relative to the change in studios by Portsmouth, as stated by petitioner, studios were not made a matter of comparative consideration by the parties. The Commission in its Decision found that the studio location proposed by each applicant would be in compliance with the requirements of the Commission's Rules. The change in location made is also in compliance with the requirements of our Rules and did not require prior Commission approval. In our decisions, absent special circumstances such as auxiliary studios in dual-city assignments of facilities, or in

order to provide special programming, not otherwise available, the Commission has consistently held that if the studios proposed are adequate to effectuate the programming proposals made, no basis for preference exists despite differences in elaborateness of studios. See *California Inland Broadcasting Company* 11 RR 257; *The Radio Station KFH Company* 11 RR 1 and cases there cited. Portsmouth has submitted both with its aforesaid modification application and herein, detailed plans of the studios to be utilized. Petitioner itself sets forth by exhibit the remodeling costs involved, and the plans submitted disclose studios which, rather than being termed adequate, would more correctly be termed elaborate. No question whatever is present as to the adequacy of the studios proposed for effectuation of Portsmouth's proposed programming. Thus, the studios being located in the same community originally proposed, there being no question as to their accessibility, the change not having required prior Commission consent and the studios being adequate to effectuate the proposals made, any superiority that petitioner could prove by further hearing as to its studio proposal would be of no comparative significance. Further hearing on this point would therefore serve no purpose.

14. Petitioner has by its pleadings herein also asserted certain matters contained in an "Opposition" to grant and "Addendum" thereto filed to the application aforesaid of Portsmouth (File No. BMPCT-4461) for extension of completion date. It asserts therein that, on the basis of a title search made at the behest of Beachview, the title held by Portsmouth to its transmitter location is defective and it therefore occupies this site as a trespasser. Without passing on the validity of the asserted cloud on the title held by Portsmouth as such, which involves a matter of local law, there has been no showing that anyone has brought an action questioning the validity of Portsmouth's title. Portsmouth is now occupying said site and, as recognized by petitioner, has performed construction thereon. In the

absence of a ruling by a Court of competent jurisdiction, the Commission would under no circumstances question this title. Further, if a different site were required, in the absence of a showing that it substantially affected the Grade A and B contours of the station, the matter would be of no materiality. See *In re Appalachian Broadcasting Corp.* 11 RR 1402.

15. In summary, in no one of the multitudinous pleadings filed herein have any matters been asserted which in any manner affect the basis of the Commission's decision in the comparative hearing proceeding. We have carefully considered each matter asserted without regard to the propriety of certain of the filings either under our Rules or under the jurisdictional question presented as a result of filing by petitioner subsequent to its appeal of our decision to the Courts. This course was followed due to the nature of the matters asserted and the disposition thereof called for. We accordingly, do not here resolve the jurisdictional question involved as to whether petitioner may properly submit matters to the jurisdiction of the Commission following invocation of the jurisdiction of the Court in a proceeding and prior to the Court's consideration of the proceeding.

16. Accordingly, IT IS ORDERED, This 1st day of May 1957, that the said motion For Leave to File Additional Pleadings IS GRANTED; the said motion to Strike filed by Portsmouth Radio Corporation IS DENIED; and the said petition of Beachview Broadcasting Corporation and supplements thereto for rehearing and other relief ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

MARY JANE MORRIS
Secretary

Released: May 2, 1957

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

June 20, 1957

45979

In reply refer to

8820

Beachview Broadcasting Corporation
431 Granby Street
Norfolk, Virginia

Gentlemen:

This refers to the (1) application (BMPCT-4461) filed by Portsmouth Radio Corporation, permittee of Television Station WAVY-TV, Portsmouth, Virginia, for extension of time to complete construction; (2) your opposition to such application, filed January 14, 1957; (3) the addendum to your opposition, filed January 22, 1957; (4) the motion to strike your opposition and addendum; and (5) the opposition filed by you against such motion to strike.

The Commission has carefully considered the matters raised by you in the above-described pleadings, and is of the opinion that they do not constitute an adequate basis for declaring the construction permit for Television Station WAVY-TV forfeited, or for designating the application (BMPCT-4461) filed by Portsmouth Radio Corporation for hearing. With the exception of your allegation that Portsmouth Radio Corporation has not been diligent in proceeding with construction, all of your allegations have been rejected by the Commission in a Memorandum Opinion and Order (FCC 57-429) in Dockets Nos. 10800 and 10801, released May 2, 1957. With respect to the question of diligence, we believe that Portsmouth Radio Corporation has clearly demonstrated diligence in proceeding with construction, and has shown good cause for an extension of its con-

struction permit. Therefore, the Commission has this date granted the application of Portsmouth Radio Corporation for extension of time to complete construction.

In light of the foregoing, your requests that the construction permit held by Portsmouth Radio Corporation be declared forfeited, or that the application (BMPCT-4461) for extension of completion date be designated for hearing are denied.

BY DIRECTION OF THE COMMISSION
MARY JANE MORRIS
Secretary

cc: Welch, Mott & Morgan
Harry M. Plotkin
Portsmouth Radio Corporation

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13383, 13913, 14001

BEACHVIEW BROADCASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
TIDEWATER TELERADIO, INC., INTERVENOR

Appeals from the Federal Communications Commission

Decided September 18, 1958

Mr. Edward P. Morgan, with whom Mr. Fred J. Eden, Jr. was on the brief, for appellant.

Mr. Richard A. Solomon, Assistant General Counsel, Federal Communications Commission, with whom *Mr. Warren E. Baker,* General Counsel, Federal Communications Commission, and *Mr. Mark E. Fields,* Counsel, Federal Communications Commission, were on the brief, for appellee. *Mr. John J. O'Malley, Jr.,* Counsel, Federal Communications Commission, also entered an appearance for appellee.

Mr. Paul A. Porter, with whom *Messrs. Reed Miller* and *Harry M. Plotkin* were on the brief, for intervenor. *Mr. George Bunn* also entered an appearance for intervenor in No. 13583.

Before EDGERTON, Chief Judge, and PRETTYMAN and DANAHER, Circuit Judges.

PER CURIAM: These are appeals from orders of the Federal Communications Commission. They involve a comparative consideration of the characteristics of two applicants for a television license and the award of the license to one of them. Under some nine headings the Commission compared the two upon various bases specified by the parties as applicable points of comparison. No complaint is now made that the Commission either failed to consider any specified point or did consider any unspecified standard; the case lies within the subjects specified as applicable. Appellant complains of the Commission's evaluations. It says the Commission erred in its specification of criteria, in its description of them, and in the facts. The Commission, discussing all these topics at some length, found no preference one way or the other except on three points. It found preference for Portsmouth (now Tidewater) in respect to civic participation and past broadcast record. It found one minor preference for Beachview on diversification of communications interests, because Portsmouth was affiliated with one of the seven standard radio stations in the area. The record contains voluminous evidence on all the topics of compari-

son considered. The reasoning of the Commission on each of the subjects is stated at length. We find nothing arbitrary, capricious, irrational or unreasonable in them.

This situation is clearly one in which the Congress has confided the function of decision in the Commission. The limited authority of the court in reviewing the matter does not touch any of the choices made by the Commission and alleged by appellant to have been erroneous. It may be that the Congress has confided too great power in the agency. But the power is in the Congress to dispense, and it is not within the judicial function to superimpose a court's judgment on regulatory measures such as those here involved.

We said in *Johnston Broadcasting Co.* v. *Federal Communications Comm'n*:[1]

> "In respect to comparative decisions, these are the essentials: (1) The bases or reasons for the final conclusion must be clearly stated. (2) That conclusion must be a rational result from the findings of ultimate facts, and those findings must be sufficient in number and substance to support the conclusion. (3) The ultimate facts as found must appear as rational inferences from the findings of basic facts. (4) The findings of the basic facts must be supported by substantial evidence. (5) Findings must be made in respect to every difference, except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant."

The findings and decision of the Commission in the present cases comply with those requirements.

Affirmed.

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[1] 85 U.S. App. D.C. 40, 46, 175 F.2d 351, 357 (1949).

EDGERTON, *Chief Judge, concurring in the result:* I think the hearing examiner and the minority of the Commission, who preferred Beachview, were clearly right, but I cannot say there was no rational basis for preferring Portsmouth.

September Term, 1958
Filed September 18, 1958

Appeals from the Federal Communications Commission.

Before: EDGERTON, Chief Judge, and PRETTYMAN and DANAHER, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record from the Federal Communications Commission, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the Federal Communications Commission on appeal in these cases be, and they are hereby, affirmed.

Dated: September 18, 1958.

PER CURIAM.

Chief Judge Edgerton concurs in the result.

September Term, 1958
Filed October 22, 1958

Before: PRETTYMAN, Chief Judge, EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, Circuit Judges, in Chambers

ORDER

Upon consideration of appellant's petition for a rehearing en banc, of appellee's opposition, and of appellant's supplement to the petition, it is

ORDERED by the court that the petition for rehearing en banc be, and it is hereby, denied.

PER CURIAM.

Dated: October 22, 1958

Circuit Judge Miller would grant the petition for rehearing en banc.

Circuit Judge Bazelon: I vote to grant the petition for rehearing in banc in order to reconsider this court's recent rulings which appear to render us powerless to restrain the Commission from employing shifting emphasis of comparative criteria obliterating any predictable pattern of decision.

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JAMES R. BROWNING, Clerk

No. 655

In the Supreme Court of the United States

OCTOBER TERM, 1958

BEACHVIEW BROADCASTING CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

J. LEE RANKIN,
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RICHARD A. SOLOMON,
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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

Opinions Below

The opinion of the court of appeals (App. 183a-186a) has not yet been reported. The decision of the Federal Communications Commission (App. 73a-166a) and its memorandum opinion denying rehearing (App. 166a-171a) are not officially reported, but are unofficially reported at 11 Pike and Fischer, Radio Reg. 939 (1956). The memorandum opinion denying reopening of the record (App. 171a-181a) is reported at 22 F.C.C. 989 (1957).

Jurisdiction

The judgment of the court of appeals was entered on September 18, 1958 (App. 186a). A petition for rehearing en banc was denied on October 22, 1958 (App. 187a). The petition for certiorari was filed on January 19, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether the court of appeals applied the proper standards of review in affirming the Federal Communications Commission's action in a comparative proceeding for a permit to construct a new commercial television station.

Statutes Involved

Pertinent provisions of the Communications Act of 1934 and the Administrative Procedure Act are set forth in the petition (Pet. 3-5).

Statement

Petitioner and Tidewater Teleradio, Inc. (then known as "Portsmouth Radio Corporation") were competing applicants in a comparative proceeding seeking award of a construction permit for a new commercial television station to operate on Channel 10 in Norfolk-Newport News-Portsmouth, Virginia. After a lengthy hearing, the Hearing Examiner issued an Initial Decision favoring a grant to the petitioner, Beachview. The Examiner favored Beachview because he believed it demonstrated superior integration of ownership with management and because he thought Portsmouth's voting trust [illegible]

trary to the public interest (App. 1a-53a). He believed the voting trust, under which Portsmouth's 61 stockholders had placed management control of the station in eleven of their number, was bad "as a matter of principle", despite his finding that the trustees were "worthy of the highest trust. Their stature in the area is indisputable. It is likewise apparent that they would do a good job in the management of the station" (App. 51a). His conclusion on integration was that Beachview was superior "numerically and stockwise" (App. 52a).

After oral argument on exceptions to the Initial Decision, the Commission reversed the Examiner and granted Portsmouth's application. In summarizing its conclusions, the Commission said (App. 105a):

> On the basis of the points of preference asserted by the parties, Portsmouth prevails in the only two in which comparative differences are found—civic participation and past broadcast record. Portsmouth's overall record in the operation of Station WAVY does lend some additional assurance of effectuation of its proposals made herein. On one other factor, diversification of communications interests, not asserted by Beachview, we have found a minor preference for Beachview. Crediting this preference to Beachview, we are of the view that Portsmouth is nevertheless comparatively superior and is the applicant more qualified to bring a television service in the public interest.

The Commission found that the voting trust, which "may be revoked by majority vote of the deposited shares", was not contrary to the public interest or to

the Commission's prior decisions and concluded that creation of the voting trust did not indicate that the non-voting stockholders "regard the proposed station solely as a business investment to the exclusion of the public interest" (App. 152a). On the question of integration of ownership and management, the Commission found Beachview's quantitative advantages, relied upon by the Examiner, to be balanced by the more significant quality of Portsmouth's integration (App. 149a). In denying rehearing, the Commission reaffirmed its views on these matters (App. 166a-181a).

The court of appeals, in a *per curiam* opinion, affirmed the Commission's decision. The court pointed out that the Commission had compared the two applicants on the "various bases specified by the parties as applicable points of comparison"; that there was voluminous evidence on each point; and that the Commission had discussed each point and stated its reasoning thereon "at length." The court found that the Commission's action had not been "arbitrary, capricious, irrational or unreasonable" (App. 184a-185a). It said that Congress had confided in the Commission the function of evaluating competing applicants and that it is "not within the judicial function to superimpose a court's judgment on regulatory measures such as those here involved" (App. 185a). It concluded finally that the Commission's findings complied in all respects with the standards previously announced by the court. Judge Edgerton, concurring, stated that, while he thought the Hearing Examiner and the

minority of the Commission were "right" in preferring Beachview, he could not say there was no rational basis for preferring Portsmouth (App. 186a).

ARGUMENT

Certiorari is sought on the ground that the court of appeals failed to exercise the review responsibilities imposed upon it. Petitioner contends that the court determined only that the Commission's decision was "internally consistent" and did not consider whether the weight or significance attached to particular criteria was consistent with the Commission's decisions in prior comparative proceedings. Nothing in the opinion below supports that contention. The court found simply that the Commission's application of its established criteria to the facts of this case was not "arbitrary, capricious, irrational or unreasonable".

Examination of recent actions of the court below in reviewing Commission decisions in comparative hearings discloses no abdication of its review powers. In three recent cases, for example, the court reversed the Commission's decision for an incorrect application of comparative criteria. *Sunbeam Television Corp.* v. *Federal Communications Commission*, 243 F.2d 26; *W. S. Butterfield Theatres, Inc.* v. *Federal Communications Commission*, 237 F.2d 552; *WLOX Broadcasting Company* v. *Federal Communications Commission*, 260 F.2d 712.

Petitioner's argument appears to be based upon its mistaken belief that the numerous factors considered

in determining which of several applications for broadcast facilities would best satisfy the "public interest, convenience and necessity" are capable of being given precise meaning and weight applicable in all situations. The public interest does not admit of such an algebraic formulation. See *Easton Publishing Company* v. *Federal Communications Commission*, 175 F.2d 344 (C.A.D.C.) Circumstances which are of critical import in one fact situation may be of much less significance in others. Thus, the Commission had a right to conclude that petitioner was entitled to only a minor preference on the ground of diversification of communications media. While petitioner owned no other communications media in the area and Portsmouth owned a local radio station, there were seven other radio stations and four other television stations in the area. This situation is obviously to be distinguished from one where an applicant owns the community's only newspaper or the only (or dominant) local radio station, where concentration of control is of much greater significance.

Moreover, as the court below has previously pointed out, the Commission's view as to the weight to be given particular factors may legitimately change as, for example, where conditions in the broadcasting industry have changed. *Pinellas Broadcasting Co.* v. *Federal Communications Commission*, 230 F.2d 204, certiorari denied, 350 U.S. 1007. As this Court has stated:

"* * * [W]e cannot say that the Commission is bound by anything that appears before us to deal with all

cases at all times as it has dealt with some that seem comparable." *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 228.

In sum, the court of appeals' recognition in this case of the broad authority given to the Commission in applying the public interest standard to licensing proceedings raises no question that is either novel or of general importance. See *Federal Radio Commission*, v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 275-277.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

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JERRY M. HAMOVIT,
Counsel,
Federal Communications Commission.

FEBRUARY 1959.

JAMES R. [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 655

BEACHVIEW BROADCASTING CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

In the opinion below, the Court of Appeals did not merely declare that it could "find nothing arbitrary, capricious, irrational or unreasonable" in the Commission's statements of its reasoning upon the topics of comparison which it considered. (App. 185a). The Court of Appeals went further, in adverting to the limited scope of its review, to disclose that it reached its conclusion because the findings and decision of the Commission complied with the following requirements of *Johnston Broadcasting Co. v. Federal Communications Commission*, 85 U.S. App. D.C. 40, 46, 175 F. 2d 351, 357 (1949):

> "In respect to comparative decisions, these are the essentials: (1) The bases or reasons for the final

conclusion must be clearly stated. (2) That conclusion must be a rational result from the findings of ultimate facts, and those findings must be sufficient in number and substance to support the conclusion. (3) The ultimate facts as found must appear as rational inferences from the findings of basic facts. (4) The findings of the basic facts must be supported by substantial evidence. (5) Findings must be made in respect to every difference, except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant."

The significance of the opinion is that it requires only that the Commission's decision touch base upon the substantial facts adduced, and be *internally* consistent in drawing its conclusions from these findings; it divorces the Commission's decision from the *external* statutory standard which is to govern its determinations. Entire, self-contained mathematical systems can be constructed, we know, by revising or rejecting a single axiom, that parallel lines meet at infinity, or that a straight line is the short distance between two points. It was never intended, however, that the Commission was to be free to pick and choose among the postulates which it would apply to a particular case; the Commission's world must remain Euclidean, bounded by the ultimate legislative criterion of the public interest, convenience, or necessity. The judicial function is not performed unless the reviewing court determines "whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action." *Federal*

Radio Commission v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276 (1933).

That the Court of Appeals, on limited occasions, has exercised its powers of review to reverse a Commission decision for an incorrect application of comparative criteria is all the more reason why it should not have refused to exercise its authority in this case. In *Sunbeam Television Corporation* v. *Federal Communications Commission*, 100 U.S. App. D.C. 82, 84, 243 F. 2d 26, 28 (1957), the Court of Appeals held that it was error for the Commission to depart from its established policy that it is desirable for local television stations and network organizations to be independent of each other; in the instant case, the Court of Appeals has disclaimed any authority to examine into the Commission's established policy with respect to such matters as integration, diversification, and civic participation. Significantly, in the other two cases also cited by respondent as examples of the exercise of judicial review, *W. S. Butterfield Theatres, Inc.* v. *Federal Communications Commission*, 99 U.S. App. D.C. 71, 237 F. 2d 552 (1956) and *WLOX Broadcasting Company* v. *Federal Communications Commission*, — U.S. App. D.C. —, 260 F. 2d 712 (1958), the majority opinions of the Court of Appeals were written, respectively, by Circuit Judge Bazelon and Circuit Judge Miller, both of whom voted to grant the petition for rehearing en banc before the Court of Appeals in this case.

By no means does petitioner aver that the Commission is bound "to deal with all cases at all times as it has dealt with some that seem comparable." *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 228 (1946) (which was not a case involving a comparative proceeding, but one which upheld the right of the Commission to take more drastic action

than that theretofore exercised in refusing to renew an applicant's license because of deceptive misstatements). Petitioner does maintain, however, that there must be some irreducible element of consistency and predictability in Commission decisions—it is only a *foolish* consistency which is the hobgoblin of little minds—that a distinction must be drawn by the reviewing court between changes in the Commission's factors of decision representing a growth and evolution of expertise, with some discernable pattern of orderly concepts, and changes in criteria by erratic, wildly fluctuating factors "good for this trip only"; and that a legislative standard which would permit a regulatory agency under any set of facts to reach any preconceived result would be no standard at all.

If other Commission decisions where a criterion has been given a particular meaning or weight are distinguishable, the Court of Appeals should require, in the exercise of its judicial function, that the changes in specification or application be justified by the Commission in the light of the public interest. If, in the situation posited by respondent (Opp. p. 6), "the Commission's view as to the weight to be given particular factors may legitimately change as, for example, where conditions in the broadcasting industry have changed," then the circumstances should be set forth by the Commission to enable the Court to determine whether the changed criterion has become more consonant with the public interest.

The state of communications law is such that this Court, which has not heretofore given direction to the scope of judicial review in comparative proceedings, must now intervene. In *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 490 (1951), this Court had occasion to state:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Court of Appeals."

Similarly, it has become necessary that this Court definitize the relationship between the Federal regulatory agencies and statutory courts of review in requiring adherence of the administrative body to the statutory standard and the Rule of Law.

For the foregoing reasons, in addition to those heretofore urged in the petition for writ of certiorari, it is respectfully submitted that said petition for writ of certiorari should be granted.

Respectfully submitted,

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